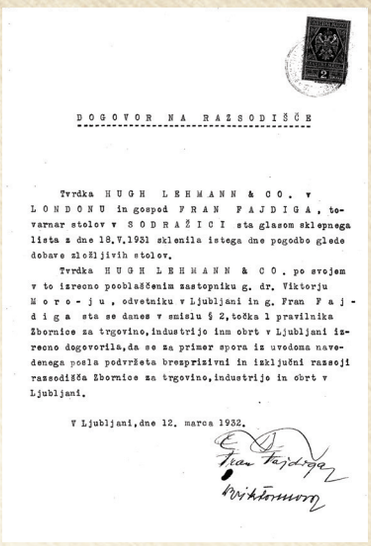
slovenska arbitražna praksa

90 let reševanja sporov

Letnik VI, Številka 2-3 (november 2017)



DOGOVOR NA RAZSODIŠČE

Tvrdka HUGH LEHMANN & CO. v LONDONU in gospod FRAN FAJDIGA, tovarnar stolov v SODRAŽICI sta glasom sklepnega lista z dne 18.V.1931 sklenila istega dne pogodbo glede dobave sležljivih stolov.

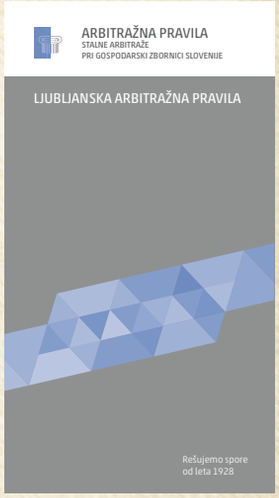
Tvrdka HUGH LEHMANN & CO. po svojem v to izrecno pooblaščenim zastopniku g. dr. Viktorju Moro-ju, odvetniku v Ljubljani in g. Fran Fajdiga sta se danes v smislu § 2, točka 1 pravilnika Zbornice za trgovino, industrijo inm obrt v Ljubljani izrecno dogovorila, da se za primer spora iz uvodoma navedenega posla podvrženta brezpriziven in izključni razsoji razsodišča Zbornice za trgovino, industrijo in obrt v Ljubljani.

V Ljubljani, dne 12. marca 1932.

Fran Fajdiga
Viktor Moro

FASADA ZBORNICE

SOBA PREDSEDNIKOV



slovenska
arbitražna praksa

Konferenca slovenske arbitraže

Ljubljana
Arbitration Centre
at the Chamber of Commerce
and Industry of Slovenia

PRAZNUJEMO 90 LET
1928 – 2018

PRAZNUJEMO 90 LET REŠEVANJA SPOROV

slovenska
arbitražna praksa
prispevek k razvoju arbitraže v Sloveniji

Letnik VI, Številka 2-3 (november 2017)

Odgovorni urednik:
prof. dr. Aleš Galič

Strokovni urednik:
mag. Marko Djinović

Ustanovitelja:
Gospodarska zbornica Slovenije,
Stalna arbitraža pri Gospodarski zbornici Slovenije

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Naročila:
Urška Bukovec (arbitraznapraksa@gzs.si)
t 01 58 98 180

Trženje oglasnega prostora:
arbitraznapraksa@gzs.si
t 01 58 98 180

Naslov uredništva:
Dimičeva 13, 1504 Ljubljana
t 01 58 98 184
arbitraznapraksa@gzs.si
www.sloarbitration.eu

90 let institucionalne arbitraže na Slovenskem

Ubere preterito pro presenti

Stalna arbitraža pri GZS v letu 2018 praznuje 90-letnico svojega delovanja!

Misel »bogastvo preteklosti za izzive sedanjosti« (lat. *ubere preterito pro presenti*) je idealna popotnica za ta izjemen jubilej, ki vsebuje dve pomembni sporočili. Po eni strani smo lahko upravičeno ponosni na bogastvo, ki smo ga ustvarili v preteklosti, po drugi strani pa v preteklosti ne smemo zastati. Dolgoletna tradicija, uveljavljena blagovna znamka, samostojno in strokovno neodvisno delovanje ter zaupanje uporabnikov, so kapital Stalne arbitraže pri GZS, ki smo ga z našimi predhodniki soustvarili v preteklih devetdesetih letih. Vendar nam prav to nalaga posebno odgovornost, da bomo znali dolgoletno zaupanje upravičiti tudi pri spoprijemanju z izzivi sedanjosti in prihodnosti in da bomo še uspešnejši kot doslej.

Najprej se ozrimo nazaj, v preteklost...

Ko je leta 1928 takratna Zbornica za trgovino, obrt in industrijo v Ljubljani (prednica današnje GZS) na pobudo trgovcev, obrtnikov in industrialcev ustanovila Razsodišče zbornice za trgovino, obrt in industrijo v Ljubljani (Zbornično razsodišče; predhodnik današnje Stalne arbitraže pri GZS), je le-to pod vodstvom njegovega tajnika, dr. Josipa Pretnarja, doživelo skoraj takojšen uspeh. Prva tožba pred Zborničnim razsodiščem je bila vložena že novembra 1928 v mednarodnem sporu med *Rudarsko združbo Litija* in avstrijsko družbo *Marchegger Maschinenfabrik und Eisengiesserei Akt.Ges*. Kmalu zatem je bilo vloženih več novih tožb, o katerih je bilo hitro odločeno, med njimi v primeru *Kravata z o.z.* iz Ljubljane proti *Beer & Reinitz, Kravatenfabrik* z Dunaja. Vest o hitrem in strokovnem reševanju sporov pred Zborničnim razsodiščem se je med takratnimi trgovci, obrtniki in industrialci nezadržno širila. Veliko se jih je obračalo na Zbornično razsodišče s prošnjo za obrazložitev poteka postopka in vedno pogosteje so v pogodbe vključevali klavzule o pristojnosti Zborničnega razsodišča. To posebej ilustrira dokumentiran primer arbitražnega sporazuma med družbo *Hugh Lehmann & co.* iz Londona in *Franom Fajdigo*, tovarnarjem stolov iz Sodražice. Vidimo, da že v tistem času državne meje niso bile nikakršna ovira za učinkovito arbitražno reševanje sporov med udeleženci mednarodne trgovine. Soliden začetni razvoj institucionalne arbitraže na slovenskem je grobo prekinil začetek druge svetovne vojne.

Obdobje po drugi svetovni vojni in vse do leta 1991 ni omogočalo pogojev za tržno gospodarstvo in posledično tudi arbitraža v tem obdobju ni dobila svojih pravih (komercialnih) kontur, kot denimo v državah zahodno od nas. Sledeč logiki jugoslovanskega samoupravnega socializma je tudi Stalna arbitraža pri GZS prilagajala svojo »identiteto samoupravnega sodišča« družbeno-političnemu razvoju naše nekdanje skupne države. Tako je naša institucija prehodila pot vse od Stalnega razsodišča pri GZ SRS (1965), Stalnega razsodišča-arbitraže pri GZS (1973) in naposled Stalne arbitraže pri GZS (1980), tj. identitete, ki jo uporabljamo še danes. V tem obdobju je bilo delovanje institucije omejeno na reševanje domačih (intra-YU) sporov, saj je bilo reševanje sporov z mednarodnim elementom »pridržano« takratni Zunanjetrgovinski arbitraži pri GZ Jugoslavije s sedežem v Beogradu. Domačih

arbitraž je bilo tedaj precej in se je (v danih razmerah) ustvarila obsežna arbitražna praksa, iz katere se lahko učimo še dandanes.

Po osamosvojitvi Slovenije leta 1991 smo se prvič resno soočili z izzivi sedanjosti in prihodnosti. Stalna arbitraža pri GZS je hitro izkoristila priložnost in si s spremembo pravil v letu 1993 povrnila svoj mednarodni značaj (možnost reševanja sporov z mednarodnim elementom). Sedem let zatem, na prehodu v 21. stoletje, se je vnovič pokazala potreba po posodobitvi pravil. Tako so bila leta 2000 sprejeta nova Pravila Stalne arbitraže pri GZS, ki so v tistem času služila kot solidna osnova za reševanje domačih in mednarodnih sporov. Ob njihovi uporabi se je razvila dragocena mednarodna arbitražna praksa, Stalna arbitraža pri GZS (kot blagovna znamka) pa se je v tem času uveljavila kot vodilna arbitražna institucija v Sloveniji.

Nato je sledilo obdobje zamujenih priložnosti. Leta 2008 je bil po vzoru UNCITRAL-ovega vzorčnega zakona sprejet nov Zakon o arbitraži (ZArbit), s katerim smo v Sloveniji dobili moderno ureditev arbitraže. Po sprejemu ZArbit se je pokazalo predvsem to, da podjetja, odvetniki in drugi deležniki potrebujejo modernejšo in bolj poslovno usmerjeno arbitražno institucijo, ki bo široko prepoznavna na območju Srednje in Jugovzhodne Evrope ter po kakovosti storitev konkurenčna najrazvitejšim arbitražnim centrom v regiji. Potrebovali smo miselni preskok... V nasprotju s pričakovanji uporabnikov je institucija vse do leta 2012 stagnirala, brez prave vizije, podpore matične zbornice, vlaganj v razvoj ter promocijo. Edinstvena priložnost za preboj je zvodenela. Z zastarelimi pravili in postopki, ki niso bili v koraku s časom, Stalna arbitraža tudi ni zadostila pričakovanjem strank glede hitrosti in učinkovitosti reševanja sporov. Klic uporabnikov po spremembah je bil glasen, Stalna arbitraža pri GZS pa mu tedaj enostavno ni prisluhnila.

S 1.1.2012 smo na Stalni arbitraži pri GZS obrnili nov list v njeni zgodovini. To leto je bilo ključno in s prenovljeno kadrovsko in organizacijsko strukturo smo pristopili k takojšnji izvedbi nujnih poslovodnih ukrepov za izboljšanje kakovosti storitev strankam in dviga zaupanja v institucijo (»**Arbitraža 1.0**«). Istega leta smo pričeli organizirati Konferenco slovenske arbitraže kot osrednji in tradicionalni dogodek na področju arbitraže v Sloveniji. Pod našim okriljem je pričela izhajati Slovenska arbitražna praksa, prva specializirana strokovna revija, posvečena arbitraži. S tem smo prevzeli vlogo središča razvoja arbitražnega prava in prakse v Sloveniji. Del prenovljenega poslovnega modela sta postala tudi promocija storitev pri odvetnikih in podjetjih ter prenos dobrih praks iz tujine v Slovenijo. V tem času smo tudi prenovili svojo celostno podobo in komunikacijska orodja. Z letom 2014 smo se nato usmerili razvojno (»**Arbitraža 2.0**«). Odločilni razvojni preboj smo naredili s sprejemom novih arbitražnih pravil (Ljubljanska arbitražna pravila), ki so pričela veljati 1. januarja 2014. Naše delovanje se je ciljno usmerilo v tri razvojne stebre: (i) promocijo Ljubljanskih arbitražnih pravil med uporabniki, (ii) profesionalizacijo storitev in ponudbe ter (iii) krepitev blagovne znamke v Sloveniji in tujini. Z namenom doseganja večje prepoznavnosti na mednarodnem trgu smo v letu 2014 pri poslovanju s tujino začeli uporabljati novo ime »Ljubljana Arbitration Centre (LAC)«. Med temeljne dosežke na področju mednarodnega uveljavljanja lahko uvrstimo tudi sodelovanje z UNCITRAL pri organizaciji letne mednarodne konference v Ljubljani (Joint UNCITRAL-LAC Conference on Dispute Settlement). Med leti 2015 in 2017 smo pripravili tudi Smernice za arbitre Stalne arbitraže pri

GZS ter prevode Ljubljanskih arbitražnih pravil v šest jezikov (angleški, nemški, srbski, makedonski, hrvaški in albanski).

V svoji 90-letni zgodovini je Stalna arbitraža pri GZS tako nedvomno odigrala pomembno vlogo pri reševanju gospodarskih sporov v Sloveniji in širše. Pod njenim okriljem so bili uspešno razrešeni številni gospodarski spori. Ustvarili smo lastno arbitražno prakso in znanje, na katerih gradimo prihodnost. Vendar so tudi zamujene priložnosti pomemben del našega dosedanjega dela in iz njih se lahko marsikaj naučimo. Izkušnje iz preteklih 90 let so nas oborožile z znanjem, trdoživostjo iz zmožnostjo prilagajanja neizogibnim spremembam časa in prostora, v katerem živimo in delujemo. Sklenimo zgodovinski pogled z besedami Georgea Santayane: »*Tisti, ki se ne spominjajo preteklosti, so obsojeni, da jo še enkrat doživijo*.«

Obrnimo se sedaj k izzivom sedanjosti in prihodnosti....

Stalna arbitraža pri GZS vstopa v svoje jubilejno leto 2018 kot institucija z jasno vizijo. Imenujemo jo »**Arbitraža 3.0**«. Gre za vizijo moderne in profesionalne arbitražne institucije zahodnega tipa, ki ima cilj, da do leta 2022:

i. utrdi primat osrednje in najpomembnejše institucionalne arbitraže v Sloveniji;
ii. postane najvplivnejši in najuspešnejši mednarodni arbitražni center za reševanje gospodarskih sporov med strankami iz Adriatic regije; in
iii. dogradi svoje storitve v skladu z najvišjimi strokovnimi in profesionalnimi standardi, ki veljajo v mednarodni institucionalni arbitraži zahodnega tipa.

Izzivi, s katerimi se soočamo v sedanjosti, in tisti, ki nas še čakajo v prihodnosti, so številni. Posebej pa jih izpostavljava pet. Prvi izziv je, kako spreobrniti politično motivirano negativno klimo do arbitraže, ki se v zadnjih nekaj letih kaže v obliki zadržanost države in občin do uporabe arbitraže v sporih iz koncesij in javno-zasebnih partnerstev. Drugi izziv je, kako premagati »kompleks slovenske majhnosti« in se bolj odločno podati na mednarodni trg. Zakaj ne bi podjetja iz regije svojih sporov ob isti kakovosti in cenovno ugodnejši storitvi reševala v Ljubljani, namesto na Dunaju ali v Zürichu? Tretji izziv je, kako naj (skupaj z zakonodajalcem, sodišči, odvetniki, podjetji in GZS) Slovenijo, ki je brez dvoma najrazvitejši sedež za arbitraže na področju ex-Yu in ima izjemen regijski potencial, uveljavimo kot atraktiven in varen sedež za arbitraže v regiji. Četrti izziv je, kako zagnati interesno in stanovsko povezovanje lokalne arbitražne skupnosti v Sloveniji po vzoru sosednjih držav. In peti izziv je, na kakšen način v prihodnosti nadgraditi ponudbo Stalne arbitraže, da bo odgovarjala potrebam trga (mediacija, kombinirani postopki, storitve administracije *ad hoc* postopkov).

Naši cilji so jasni in jih ne skrivamo. Smo ambiciozni, drzni in za zgled jemljemo najboljše arbitražne institucije širom sveta. S svojo 90-letno dediščino ravnamo spoštljivo, obenem pa se dobro zavedamo svoje vloge in odgovornosti. Zavedamo se tudi, da smo del globalizirane ekonomije in da delujemo v pogojih ostre konkurence. Vse to in želja po nenehnih izboljšavah nas navdaja z elanom, ki je nujen predpogoj za uspeh in vero v to, da se bomo čez deset let s ponosom ozrli na stoto obletnico delovanja Stalne arbitraže pri GZS.

mag. Marko Djinović
strokovni urednik

prof. dr. Aleš Galič
odgovorni urednik

Joint Venture Disputes

Daniel Greineder, Konstantin Christie

Daniel Greineder is a Partner at Peter & Partners, a specialist international arbitration practice in Geneva, and has practised in Geneva and London. He has represented parties to institutional and ad hoc arbitrations as well as to contractual price reviews and mediations, with particular emphasis on JV, energy sector and construction disputes. Daniel Greineder has often worked with lawyers from different common and civil law backgrounds and many of his cases involve the application of foreign law. He is an English-qualified barrister and was called to the Bar of England and Wales in 2005.

Konstantin Christie is a Senior Associate at Peter & Partners. For the past 10 years, his practice focused on international commercial and investment arbitration, as well as disputes under public international law. His clients often come from the oil, gas and electricity sectors, as well as heavy industry. A native Russian speaker, he often handles cases from Eastern Europe, Russia and CIS, especially arising from JVs and profit sharing agreements, governed by Swiss and foreign laws. Konstantin was admitted to the Bars of New York & Massachusetts in 2007, and trained in Geneva and Paris.

What is a joint venture?

The term "joint venture" ("JV") is itself not a precisely defined technical term.[1] Black's Law Dictionary, for instance, defines a joint venture as 'a business undertaking by two or more persons engaged in a single defined project'.[2] In practice, it may be difficult to distinguish a joint venture from, for example, a distributorship or partnership agreement.

What is important is that most joint ventures involve a high degree of cooperation between the parties

For the purposes of this article, a precise definition is not necessary. What is important is that most joint ventures involve a high degree of cooperation between the parties. With each party typically contributing its part to a shared project that will benefit the other and thus the collaboration as a whole. What a party has to offer will vary.

The following are some examples of JVs:

- a foreign oil company cooperating with a local partner in order to explore and exploit natural resources;
- a cooperation between the inventor and an industrial company with a view to making the invention suitable for large-scale production;
- several construction contractors combining their resources in order to bid for and construct a major project, such as an airport, a tunnel or a bridge;
- a foreign company and a local partner, company or person, who can obtain approval for the shared project from the relevant governmental agency; in some countries foreign partners will be legally required to work with a local partner; and
- two companies pooling resources so as to benefit from economies of scale or, for example, higher technology, to develop a product that neither could afford to develop on its own.

In an international context, that cooperation will often involve parties from different countries, sometimes operating in a third country. Sometimes the partners

1 Jörg Risse in 'Disputes arising from joint venture agreements' in Edward Poulton (Ed), Arbitration of M&A Transactions (London, 2014), page 370.

2 Edward A Garner, Black's Law Dictionary (2nd Pocket Ed) (St Paul, 2001), page 376. An earlier edition defined a joint venture as 'a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit' (Joseph R Nolan et al, Black's Law Dictionary, West Publishing Co (St Paul, 1990), page 839.

will set up a joint venture company ("JVC")[3], perhaps to comply with local laws. In other cases, the cooperation will be contractual or a partnership.

Certain recurring disputes in international JVs

Whatever legal form an international JV takes, the disputes generally involve some failure of cooperation. Often, rather than creating synergies, the partners from different business cultures may find that they are incapable of communicating with each other. One partner might, for example, act spontaneously and without due care, while the other might insist on strict formalities in decision-making. Further, because of their different perspectives, parties may have different expectations and standards when it comes to corporate responsibility or government lobbying (evolving into potential allegations of corruption).

Disputes among JV partners in an international context can take some of the following forms:

- disputes over corporate governance – these include disputes over the control of the JV generally and shareholder disputes in particular, for example, where one partner accuses the other of having abused its rights as a shareholder or acting with disregard to the benefit of the JVC;
- disputes arising from different assessments of the prospects of a project – one party may want to abandon it, while another prefers to continue;
- allegations of fraud and dishonesty – for example, one partner may allege that the other was self-dealing or enriching itself or its subsidiaries/family members at the expense of the JVC or its partners; and
- misappropriation of proprietary information – often one partner will contribute know-how to the JV, such as expertise in the mass production of a technical product, only to find that the other partner has misappropriated the knowledge for its own (as opposed to the JVC's) use.

3 Edgar Herzfeld, Joint Ventures, 2nd edition (London, 1989), page 4.

Both the success and failure of a JV can trigger disputes – if a JV develops badly, partners are quick to turn on each other and blame the other party. When a JV is successful, partners often argue over the share of the profits.

Arbitrating JV disputes

Arbitration is particularly suited to resolving JV disputes. Parties benefit from its well-known advantages, described in one leading text as 'neutrality' and 'enforcement'.[4] Where parties from different jurisdictions cooperate in a third country, they will usually not want to submit to the jurisdiction of the courts of either country, while the courts in the country of the cooperation may not be suitable. Arbitration is therefore chosen to provide a neutral forum allowing each party to choose an arbitrator (unless a sole arbitrator is chosen). The New York Convention ("NY Convention") provides a reliable framework for the enforcement of arbitral awards, even in countries where the courts have not yet become sufficiently experienced or reliable and independent. Thus, today 157 countries are signatories of the NY Convention with all of European countries and those from the MENA region being signatories.[5]

A further benefit is procedural flexibility. Parties can set a timetable appropriate to the value and complexity of the dispute allowing for expert evidence, document production, a witness hearing and applications for interim relief or jurisdictional decisions.

The procedural freedom offered in arbitration will only benefit the parties if it is used wisely. Parties are therefore well advised to choose a place of arbitration in a jurisdiction that is broadly pro-arbitration and where the local courts have the experience to support

4 Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, Redfern and Hunter on International Arbitration, 5th edition (Oxford, 2009), page 31.

5 See www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last accessed 24 July 2017) and www.newyorkconvention.org/news/angola+accedes+to+the+new+york+convention (last accessed 24 July 2017). Some of the countries-outliers that have yet to become signatories to the NY Convention include Turkmenistan, Iraq, Libya, as well as many countries in the sub-Saharan Africa.

Both the success and failure of a JV can trigger disputes – if a JV develops badly, partners are quick to turn on each other and blame the other party. When a JV is successful, partners often argue over the share of the profits

arbitral proceedings. According to the latest statistics, the most popular seats of arbitration include London, Paris and Geneva, which all of which are located in well-known and arbitration-friendly jurisdictions – Switzerland, England and France.[6] The parties may also want any arbitration to be administered under the rules of a reputable arbitral institution in order to prevent respondents to a claim from attempting to sabotage the arbitration process – for instance, an experienced arbitral institution will normally make sure that the arbitration process continues despite a party's attempt to stall the nomination of the arbitral tribunal.

Parties should also choose counsel and arbitrators experienced in international arbitral practice. Familiarity with the law applicable to the main contract may not be the deciding factor. Often it is more important to work with practitioners who have experience of a particular industry sector as well as arbitral practice and procedure, and are comfortable working with figures/accounting principles, as well as technical or industry experts.

Ideally, the arbitration clause has to be included in all of the contracts with the potential respondents and the future partners in a JV would be well served by spending some time attempting to anticipate what sort of disputes may arise and which party would be the most likely respondent

JVs take different forms and arise in a range of industry sectors, so it is not always easy to record them in the statistics of arbitral institutions,[7] although such disputes clearly represent a large share of arbitral disputes. The LCIA Registrar's Report classified 21.2 per cent of referrals to arbitration in 2016 as involving JV and shareholder disputes, compared with 12 per cent in 2013 and 9 per cent in 2012.[8] The SCC recorded that JV/partnership disputes made up 15 per cent of new cases in 2016.[9] The ICC Arbitration Bulletin does not record JV disputes as such, but notes that 25 per cent of all cases initiated in 2015 arose out of construction and engineering projects, with another 18 per cent from the energy sector.[10] These are industries in which JVs are common.

Arbitration clause and Jurisdictional Issues

In simple terms, an arbitral tribunal usually only has jurisdiction over the parties to the arbitration agreement, which is normally contained in the main contract. In JV disputes, this may cause difficulties. Sometimes a claimant will want to bring a claim against the parent company of the respondent or against some other company in the same group, which is not a signatory to the arbitration agreement. Problems may also arise where a claimant tries to extend the scope of an arbitration clause from the main contract to ancillary contracts, or attempt to have an award that would order a JV partner to cause another party to act or refrain from certain behaviour. In such cases, it may be difficult to remain within the scope of the original arbitration clause, and a state court may be called upon for assistance. Ideally, the arbitration clause has to be included in all of the contracts with the potential respondents and the future partners in a JV would be well served by spending some time attempting to anticipate what sort of disputes may arise and which party would be the most likely respondent.

Depending on the nature of their cooperation, the JV partners may also wish to include specific provisions in the arbitration agreement, which will deal with such situations as continuing performance of an obligation or the continuing running of the JVC during the resolution of the dispute. In particular, which arbitral institution rules are named in the arbitration clause may be particular relevant as issues of joinder of third parties and non-signatories to the arbitration agreement are handled differently according to the rules of ICC, LCIA, SIAC, UNCITRAL and Swiss Rules.

Putting forward and defending a claim

As with any arbitration, once the dispute is ongoing or imminent, a claimant must first decide what it wants to achieve in the arbitration. For example, if it wants to recover substantial damages, there is no point in bringing a claim that will lead only to a declaration or order

6 See ICC International Court of Arbitration Bulletin, Issue 1 (2016), page 16.

7 Swiss Chambers' Arbitration Institution, for instance, reported that during the 10-year existence of the institution only 1 per cent of its cases stemmed from JVs. However, at the same time, it reported that other cases that may include a JV element (such as cases from construction, shareholders' agreements and IP disputes) total 12 per cent. See www.swissarbitration.org/sa/download/statistics_2014.pdf (accessed 11 December 2015).

8 See http://www.lcia.org/News/lcia-facts-and-figures-2016-a-robust-caseload.aspx (last accessed 24 July 2017).

9 See http://sccinstitute.com/statistics/ (last accessed 24 July 2017).

10 ICC International Court of Arbitration Bulletin, Issue 1 (2016), page 17.

for specific performance. Conversely, if the damages are difficult to establish or would not be a sufficient remedy – a declaration or a cease and desist order may be the correct claim. Equally, an award for damages against a respondent that is bankrupt or whose assets are unreachable may be of no value.

In the context of JV disputes in particular, a quick resolution of the dispute or interim measures may be the means to an end. For instance, a JV partner may be more interested in the safeguarding of the JVC and the removal of certain impediments to its operation, such as an unblocking of the JVs accounts in case of a corporate governance dispute or an order declaring the validity of a distribution agreement, than a declaration of liability and a damages award.

Legal bases of a claim

In international JV disputes, the terms of the joint venture agreement ("JVA"), its addenda, agreed variations and/or additional agreements between subsidiaries, are usually the starting point for establishing a legal basis for the claim.

The JVA will typically be governed by the law of a particular (usually neutral as to the JV partners) jurisdiction, chosen by the parties, as discussed above. As already mentioned, the JV partners, especially in the international context, can benefit from a JVA that is specific and detailed regarding the various duties and responsibilities of the partners and their agents/representatives. Failure to abide by these provisions of the JVA would then serve as the first basis for the claims. Additionally, the law of the jurisdiction that governs the JVA may also include certain rights and remedies of stakeholders, basic duties of the partners (the duty of good faith is a good example) as well as more specific prohibitions on self-dealing. The law chosen by the JV partners to govern their relations is also important since the rules of contractual interpretation of that jurisdiction will apply to any contractual gaps (*lacuna*).

A claimant may also need to take account of the provisions of the JVC and the law applicable to the JVC, as distinct from the JVA. In JV partnerships, the JVC is often incorporated in the jurisdiction distinct from that of the JVA. This may be a requirement of the state enterprise/government that calls for a tender on the infrastructure project, or be a matter of convenience/tax breaks for the JV entering into a joint manufacturing project with a local partner.

As a result, a claimant may bring claims under the JVA, but will have to consider the laws of the jurisdiction to which the JVC is subject to, as well as any provisions found in the incorporation documents of the JVC. The need may arise where the claims touch on areas subject to local law, such as the tax liability or insolvency of the JVC, or allegations of failure by one JV partner to comply with all of the corporate reporting requirements/permits necessary for the JVC's operation. The law applicable to the JVC may also be very relevant to issues of the governance of the JVC, such as the status of decisions by the board or supervisory board or the directors' personal responsibility for them.

Unfortunately, the JVAs seldom regulate the day-to-day details of how a JVC is to be run. Parties often do not know exactly how their relationship will evolve at the level of the JVC when they enter into a JVA and often rely on boilerplate terms such as the use of "best efforts" in order to bring about a certain milestone or performing an obligation. This term can be interpreted very differently based on which country a JV partner is from, or on which jurisdiction governs the contract. The challenge to a claimant (and the tribunal faced with the resolution of the claim) is to interpret such gaps and apply this interpretation to the specific allegations/breach that occurred in a particular case.

Preparing and arguing claims

The actual claims stemming from the JVA or provisions of the JVC are often based on complex factual background specific to the particular circumstances of the JV (in particular if the JV had been functioning for some time), as well as several rounds of negotiations of the JVA itself. The best approach in the preparation of claims under a JV is to diligently research and organize all of the facts of the case (including the facts that may be negative to a party's case) and then assess what a claimant can realistically achieve and what additional evidence would be necessary/useful. Although this may involve expense and significant labour investment upfront, this may save a lot of time and efforts in the long run.

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Gathering evidence

Since every JV dispute is first a story of a commercial collaboration, a party may need to rely on various witnesses to tell it. Often, the main witnesses would be the very people that initiated the JV in the first place, and therefore their recollections may be skewed by emotion or regret as to what could have been achieved or what was lost. It is important to manage the testimony of such witnesses and present solely the facts, preferably which are then corroborated by documentary evidence.

Company officers may also come and go, and it may be hard to find the right witnesses, who will appear collected and sincere. In addition, the witnesses may find it difficult to recount events that took place over several years, and there may be cultural reluctance to giving evidence. Still, for the most part, arbitrators find it useful to hear witnesses' versions of events. For example, if the case concerned an accounting dispute, a party would usually do well to call its CFO or other senior financial officer. Similarly, if the issues involve allegations of failure to conduct operations with the right technology or in accordance with industry standards, then a chief engineer may testify.

Independent of any technical or legal arguments, a party's story must be credible. Since JVs often last several years before an arbitration is started and the arbitration will concern multiple incidents, it may be difficult to gather all of the evidence and gaps may arise. This makes JV arbitrations different from, for example, a sale of goods dispute.

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It is for this reason that a JV partner should carefully and in advance of launching its claim prepare and organize the available documents. Arbitrators of all legal backgrounds particularly value contemporaneous documentary evidence. This may include the minutes and agenda of meetings, formal resolutions or signed certificates of milestones achieved (in construction projects in particular). Objections to a party's conduct or reasoned responses to them may also be important, as the failure of a party to record its position or respond to complaints at the time may count against it in a subsequent dispute. Email correspondence sometimes may pose a problem because emails are often written in a condensed, casual style that does not reflect the full complexity of the situation.

International arbitrations typically provide for a document production phase, when each party is allowed to request certain documents it believes are relevant and material to its claims and is believed to be in the possession of the other party or under its control. The details of document production procedure and various practices/defences that can arise during the production phase is beyond the scope of this article. However, at this stage it is important to note that in international arbitration, a party should not be too optimistic regarding the amount of documents that it is likely to receive from the other party. Arbitrators rarely grant an order for production of documents in response to a wide-ranging document production request, which a claimant would often present in order to seek documents to build its case – international arbitration is very different in this respect from US-style litigation. Therefore, each JV partner should use best practices in terms of its own record keeping and in terms of assessing the chances of its own case, rely on the documents that it has.

Separately, in preparing and prosecuting its case, it is important for any party to prepare and asses the evidence of damage and loss with a critical eye. It is certainly ill advised to start a case without full evaluation of the damages, as this may lead to a situation where after going through all of the steps of arbitration, the arbitral tribunal may find that awarding of damages is unwarranted or too speculative.

Although the laws applicable to the JVA and JVC will also be very relevant for the case, as described above, quasi-academic discussion of general obligations or intricacies of the law is best avoided. An experienced arbitral tribunal will approach the case as a commercial dispute and will evaluate each claim in light of all the facts of the case and each party's actions/behaviour during the life of a JV. What is very important, as will be discussed in more detail in the section on remedies below, is that the legal framework relied upon by the claimant provides for the remedy or extent of damages that are being sought. Although this may seem basic, many claimants have effectively lost their cases due to their failure to connect the law with the remedy requested.

Some practical aspects in putting forward the claims

The following points might help a party in the presentation of its claims:

- State every prayer for relief very clearly. Although this is basic, often this page comes at the end of the brief and the party or its counsel may not always dedicate the required time to consider the consequences of the requested relief and stated breach, especially in complex cases with several breaches or when a non-pecuniary relief is requested. In such cases, or when a breach/remedy involves a point of local corporate law, this has to be especially clear (more on this in a section on remedies below). At an early stage of the arbitration procedure, it is often useful or even necessary to make a reservation regarding the right to amend a claim at a later stage, once the case is developed or a statement of defence is filed.

- Avoid making trivial allegations – JVs in developing economies especially, are not known for being easy and arbitrators expect parties to face and overcome occasional difficulties. For example, a series of cancelled meetings and indecisiveness/stalling for time may not amount to a lack of good faith, even if a contract contained an obligation to act with "best efforts".

- Keeping claims simple in terms of facts and legal grounds relied upon – a claimant should invoke a contractual or statutory provision that is the most simple to prove in order to obtain the desired remedy; in particular, allegations of fraud, dishonesty, corruption and bad faith should be approached with caution, as they can be extremely difficult to prove. In practice of the undersigned, arbitral tribunals are often reluctant to find that a poor business decision amounts to a breach of a good faith or best efforts obligation.

Some practical aspects in defending the claims

The same principles for bringing a claim against a JV partner are also applicable to defending a claim. The factual arguments that justify actions on the basis of commercial considerations must be made clear and be used with an view to convince an arbitral tribunal. Of course, a claimant often faces a stronger challenge as it needs to make a positive case for why legally and factually it is entitled to a particular relief – a defendant "merely" has to demonstrate the shortcomings of the claimant's case.

In general, the following tactics may be helpful to a JV partner facing an international arbitration claim:

- Often, a defendant may wish to demonstrate that it is the claimant or other partners in the JV that are responsible for the negative event underpinning the claim against it, as most JVs require the cooperation of all the parties. A respondent may argue that in fact claimant's actions contributed or were wholly responsible for the loss or damage in question. In one particular case from our practice, a claimant brought a claim first, in anticipation of the counterclaim from respondent, in order to change the dynamics of the arbitration and seek the high moral ground with the tribunal.

- Putting a claim in the economic or industry context – a respondent may be able to deflect blame by showing that wider changes in the market, industry sector or regulatory requirements in fact caused the JV to fail.

- Qualify the obligations in terms of the parties expectations or law – as mentioned above, JV partners often describe their contractual obligations using general terms such as 'best efforts' and 'cooperation in good faith'. Usually a claimant will seek to define such terms broadly, but a respondent may be able to convince that such terms must be interpreted narrowly, by relying on the negotiations' documents, industry practice or the norms of the law applicable to the agreement.

- Respondents may also try to excuse their conduct by relying on the fact that it had to act in a way that was required by a third party. This is often the case with state-owned JV partners, for instance, which may rely on a government requirement or ruling to escape liability. A respondent may also rely on the doctrine of *force majeure*.

Remedies

Whether claimant or respondent, a party in an arbitration will seek to recover either monetary damages

Avoid making trivial allegations – JVs in developing economies especially, are not known for being easy and arbitrators expect parties to face and overcome occasional difficulties. For example, a series of cancelled meetings and indecisiveness/stalling for time may not amount to a lack of good faith, even if a contract contained an obligation to act with "best efforts"

for loss suffered as a result of the breach of contract or statute or seek a declaration/order connected with a particular form of relief. The measure of damages will vary according to the governing law of the contract but the following heads of damages are commonly encountered:[11]

- Loss of future profits – a claimant may seek to recover the profits that it would have earned from the JV had its partner or partners properly performed their obligations. This type of claim often involves expert evidence regarding the future performance of the JVC/JV in a "but-for the breach" scenario.

- Loss of value of the JVC driven by a loss of a particular contract or concession, imposition of taxes or levies, a failed transaction or IPO, as well as a disruption of the distribution chain.

- Reputational harm – sometimes a JV partner may consider that its reputation has suffered as a result of its association with a failed JV, actions of its other partner in the context outside of the JV or even due to one partner starting arbitration/litigation proceedings. One example is when an inventor of a new technology has worked unsuccessfully with an industrial company on adapting a product for mass production. In practice, however, reputational harm is difficult to prove and quantify.

- Disgorgement damages – in cases of self-dealing or breach of obligations of trust and honesty, a respondent may be liable to pay any illicit benefits or profits to the claimant party.

Whatever the damages claimed, the parties will usually seek the assistance of damages experts, who are often trained accountants, especially where profit calculations or valuations are involved, or in cases where misappropriations of the funds of the JVC is involved. An experienced arbitral tribunal will only award damages if it is persuaded that the amounts claimed are rooted in evidence (including past performance) and are not overinflated. Claims should therefore be realistic. It may also be prudent to break the damages or prayers for relief into subsidiary and alternative claims so that an arbitral tribunal can award at least a part of the damages, if it has concerns over an aspect of the main claim.

Of course, aside from claiming monetary damages, parties often are interested in non-pecuniary claims and may consider other remedies such as:

- declaratory relief – this may take many forms, including declarations that a particular decision was valid or that a JV partner is liable for tax liability or third party claims arising in the future;

- specific performance – an order requiring a party to perform a contractual obligation, such as contribute to the capital of the JVC or allow access to the construction site;

- orders to give effect to call and put options or to proceed with the preparation and issuance of an IPO;

- orders for the JV partner to cease and desist from certain conduct, such as continued use of proprietary technology; or

- order for a JV partner to cooperate in the winding up or sale of the JVC.

When the cooperation between the JV partners stalls or the board of directors of a JVC is blocked, an arbitral tribunal may also be asked to order for a trustee or agent to be appointed to carry out a particular order. This may be particularly appropriate where serious doubts exist as to whether a respondent will carry out an order or in order to safeguard interests of all partners/minority shareholders in the JVC.

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11 See generally, Yves Derains and Richard H Kreindler, 'Evaluation of Damages in International Arbitration', ICC Publication No. 668 (Paris, 2006).

Conclusion

As seen above, international arbitration may be particularly suitable for resolution of international JV disputes. Some disputes may be prevented or minimized through careful drafting of JV contracts and arbitration agreements in particular. For others, the commercial and legal considerations of any JV require that a case be well prepared and handled so as to maximize the changes of the JV partners' success in arbitration and the survival or organized winding-up of a JVC (as the case may be).

Therefore, the parties are encouraged to organize their case materials with assistance of counsel or through their own efforts in advance and to consider the various options and remedies available to them before launching their claims. Each JV partner should be honest about its own chances and be very transparent with its counsel in an arbitration, as to avoid any surprises in terms of unhelpful documents. Once launched, the flexible procedural rules of international arbitration can serve the JV partner well in making sure that its case is heard by an experienced panel, familiar with the industry and the law, and that any party has ample opportunity for preparing the claim and securing its interest in the JV.

As seen above, international arbitration may be particularly suitable for resolution of international JV disputes. Some disputes may be prevented or minimized through careful drafting of JV contracts and arbitration agreements in particular. For others, the commercial and legal considerations of any JV require that a case be well prepared and handled so as to maximize the changes of the JV partners' success in arbitration and the survival or organized winding-up of a JVC (as the case may be)

The Applicable Law in International Commercial Arbitration

Some Policy Considerations for Kosovo's New Legislation on Private International Law

Dr. Robert Muharremi

Dr. Robert Muharremi is assistant professor of international law at the Rochester Institute of Technology in Kosovo, arbitrator with the Arbitration Center at the American Chamber of Commerce in Kosovo and the Kosovo Chamber of Commerce, and member of the Permanent Court of Arbitration.

Introduction

The Government of Kosovo plans to draft new legislation on private international law, also known as the conflict of laws. Kosovo still applies the law of the former Socialist Federal Republic of Yugoslavia on "resolving conflict of laws with regulations of other countries" of 1982. Apart from the fact that this law contains hardly any provisions on international commercial arbitration, it is in many aspects outdated, such as its reference to respect for the fundamentals of the socialist system, which has been abandoned by Kosovo since 1999 when its administration was taken over by the United Nations, followed by Kosovo's declaration of independence in 2008.

In a purely national arbitration, questions of applicable law are usually ignored. Arbitrators apply the national law as the parties are typically nationals of that state and the subject matter of the dispute, such as a contractual transaction, is localized in the country. International commercial arbitration, however, is particularly prone to questions about the applicable law as it usually involves parties with different nationalities, different places of residence, or different places of performance. There are at least three different issues in international commercial arbitration, where questions about the applicable law may become relevant. First, as arbitration is triggered by an arbitration agreement, the question is which law applies to such agreement in order to determine if it is valid to serve as a legal basis for arbitration proceedings. Second, which law will apply to the establishment of the arbitration tribunal, the arbitration proceedings and what role with the national courts play in the arbitration proceedings? Third, which law will the arbitration tribunal apply to the substance of the dispute?

There seem to be at least four approaches as to how to regulate the law applicable to an arbitration agreement, which is usually included in a contract in form of an arbitration clause. These four options would become relevant if the parties do not specifically agree on which would be the law applicable to the arbitration agreement, bearing in mind that such a choice of law concerning an arbitration agreement is indeed a rare case

The Law Applicable to the Arbitration Agreement

There seem to be at least four approaches as to how to regulate the law applicable to an arbitration agreement, which is usually included in a contract in form of an arbitration clause. These four options would become relevant if the parties do not specifically agree on which would be the law applicable to the arbitration agreement, bearing in mind that such a choice of law concerning an arbitration agreement is indeed a rare case.

The first approach would be that the law applicable to the arbitration agreement is deemed to be the law which the parties have agreed to be applicable to the main contract which contains the arbitration clause or which is determined to be the applicable law pursuant to the private international law rules applicable to the main contract.[1] The key argument in support of

1 Blackaby, N., Partasides, C., Redfern, A., Hunter, M., Redfern and

this approach is that the choice of law by the parties as regards the main contract implies that this choice of law also extends to the arbitration clause. This presumes that the parties have made an explicit or implied choice of law which fails to provide a solution if the parties are silent on this matter. It is also argued that the autonomy of the arbitration agreement requires a different treatment from the main contract and may therefore be subject to another applicable law. Since the arbitration agreement may be considered an agreement in the material-legal sense, private international law rules would also apply to it.

The second approach would be to consider the law of the seat of the arbitration as the law applicable to the arbitration agreement.[2] The main argument in support of this approach is that the arbitration agreement has the closest and most real connection to the seat of the arbitration and that its law is therefore the most suitable law to govern it. It is also argued that the law of the seat of arbitration would be consistent with Article V.1 (a) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") which refers to the law of the country where the award was made, and which is considered to be the country where the seat of arbitration is. Aligning the law applicable to the arbitration agreement with Article V.1 (a) of the New York Convention would facilitate the recognition and enforcement of the award, which is one of the most important aspects of an arbitration.

The third approach, which also considers the arbitration clause to be separate from the main contract, seeks to find the applicable law in the intentions of the parties, subject to mandatory national and international law.[3] This approach works to the extent that the arbitral tribunal can identify an explicit or implied intention of the parties as to the applicable law. It also implies that the law of the country applies where the seat of arbitration is, since the arbitral tribunal should apply its mandatory laws.[4] For this reason, the third approach may be considered a modification of the second approach.

The fourth approach is a combination of the three preceding approaches allowing alternatively for different options to determine the applicable law, such as the choice of law by the parties, the law applicable to the substance of the main contract or the law of the seat of the arbitration.[5] This approach is by far the most conducive to validating the arbitration agreement as it implies the presumption that the law should apply which is in favor of the arbitration agreement.

Considering all options together, the preferred approach would be a combination of the fourth and the third approach, allowing for multiple options for determining the applicable law, which is most conducive to validating the arbitration agreement, subject to compliance with the mandatory law of the seat of arbitration as that would be relevant for recognition and enforcement under the New York Convention.

The Law Applicable to the Arbitration Procedure

The law applicable to the arbitration procedure concerns issues such as the establishment of the arbitral tribunal, the arbitration procedure to the extent not agreed by the parties, and the role of the national courts in the arbitration proceedings. These are important aspects as every country may have different preferences and regulations in regard of the involvement of national courts and mandatory procedural rules to be applied in an arbitration procedure.

The law applicable to the arbitration procedure concerns issues such as the establishment of the arbitral tribunal, the arbitration procedure to the extent not agreed by the parties, and the role of the national courts in the arbitration proceedings

It is established that the arbitration procedure is governed by the law where the seat of the arbitration is, also known as the *lex arbitri*. The seat of the arbitration is, in the first instance, agreed upon by the parties, which implies a choice of the *lex arbitri* of the designated seat country. However, there is problem if the parties have not chosen the seat of arbitration. The most common approach in this situation is that national law or applicable arbitration rules may provide for a designation of the seat of the arbitration, which usually gives the arbitral tribunal discretion in determining the seat.[6] But if the seat of arbitration is not designated by the parties, and the parties have not designated a specific

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Hunter on International Arbitration, Oxford University Press, New York. 2009, p. 167.

2 Blackaby, N. et al., p. 168.

3 Blackaby, N. et al., p. 172.

4 On mandatory national law in international commercial arbitration, see Barraclough, A., Waincymer, J., Mandatory Rules of Law in International Commercial Arbitration, in Melbourne Journal of International Law, Vol. 6, 2005.

5 Swiss Federal Statute of Private International Law, Article 178 (2).

6 See UNCITRAL Rules, Art. 16 (1).

set of arbitration rules which include provisions on the seat of arbitration, how will the arbitral tribunal be able to determine the *lex arbitri*? The International Chamber of Commerce (ICC), for example, provides that in such case the *lex arbitri* should be that of the country of the sole or presiding arbitrator.[7] This is an elegant solution but works only before the ICC. It may therefore be useful to have such a provision also included in national law on arbitration.

An issue, which is connected to the seat of arbitration, is the question about the place where an arbitration award was made. The New York Convention, for example, focuses on the place where the award was made, and not on the seat of arbitration.[8] Although there are various possibilities to consider for determining where an award is made, such as the place where the hearings were held, or the place where the award was signed, the predominant view seems to be the award is made at the seat of arbitration.

Another interesting aspect worth being considered is the Swiss model that allows the parties to select the *lex arbitri* of a country other than that of the country where the seat of arbitration is.[9] To illustrate the point, the parties have selected Kosovo as the seat of arbitration but have also agreed not apply the *lex arbitri* of Kosovo but, as an example, that of Slovenia. This means that the arbitral tribunal in Kosovo will apply the Slovenian Arbitration Act on arbitration procedure. While this approach favors party autonomy, it may complicate arbitration proceedings. Kosovo courts, and their modes of intervention in arbitral proceedings, will apply Kosovo law and will hardly take account of the choice made by the parties to apply Slovenian Arbitration Act on arbitration procedure. Thus, as regards mandatory Kosovo law and legal remedies to be provided by courts, Kosovo courts will still apply Kosovo law. Selecting Slovenian *lex arbitri* as applicable to the arbitration proceedings will hardly make Slovenian courts have jurisdiction in matters like injunctions or interim measures related to arbitral proceedings, which happen in Kosovo. Finally, when it comes to the recognition and enforcement of the arbitral award, the New York Convention refers to the rules of the country where the award was made, i.e. the seat of arbitration, which also implies Kosovo rules on arbitration proceedings. If the award was not made in accordance with these procedural rules but pursuant to other rules, although agreed upon by the parties, it may cause problems for the recognition and enforcement of such award. In view of these possible complications, legal certainty about which is the *lex arbitri* and consistency with the rules on the recognition and enforcement of arbitral awards should take precedence over party autonomy when it comes to selecting the procedural law of a country other than that of the country where the seat of arbitration is.

The red thread throughout these considerations is that the law of the seat of arbitration as the *lex arbitri* will be conducive to recognition and enforcement of an arbitral award and will reduce complexity in determining which law applies to the arbitral proceedings. Limiting party autonomy with regard to selecting a different *lex arbitri* would serve the needs of legal clarity and certainty.

The Law Applicable to Arbitrability

The law applicable to the arbitrability of a dispute deserves special attention

The law applicable to the arbitrability of a dispute deserves special attention. There seem to be different approaches as to how to qualify questions of arbitrability, i.e. whether as an issue connected to the arbitration agreement or to the arbitration procedure. One approach would be to consider arbitrability as a matter related to the law applicable to the arbitration agreement. The other approach would be to treat arbitrability as part of the law applicable to the arbitration procedure. Depending on how this question is answered, it may result in different applicable laws.

Arbitrability is evidently an aspect of national law. It is national law, which determines if a subject matter may be settled by arbitration and which determines if certain disputes should be exclusively dealt with by its state courts and not by arbitration. It is thus closely related to the question if and to what extent national courts play a role in arbitration proceedings

Arbitrability is evidently an aspect of national law. It is national law, which determines if a subject matter may be settled by arbitration and which determines if certain disputes should be exclusively dealt with by its state courts and not by arbitration. It is thus closely related to the question if and to what extent national courts play a role in arbitration proceedings. It is also relevant for the recognition and enforcement of an arbitral award as the New York Convention requires the arbitral agreement to be in accordance with the law where the award was made[10], which is in principle

7 Blackaby, N. et al., p. 174.

8 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), Art. V (1).

9 Swiss Federal Statute of Private International Law, Article 182 (1).

10 New York Convention, Art. V.1 (a).

the law of the country where the seat of the arbitration is. If the dispute is not arbitrable in the country where the seat of the arbitration is, the arbitration agreement may not be valid and may therefore not be recognized and enforced.

Arbitrability thus depends on the law of the seat of arbitration and should therefore be considered as a matter related to the applicable law of arbitral procedure rather than that of the arbitration agreement, which may not necessarily be the law of the seat of arbitration. In order to clarify this issue and avoid legal uncertainty, national law should clearly provide for which law applies to the arbitrability of a dispute and which would primarily be the law of the seat of arbitration.

Law Applicable to the Substance of the Dispute

It is established that there is a difference between the *lex arbitri*, which governs the arbitral proceedings and the law applicable to the substance of the dispute. International commercial arbitration usually involves cross-border transactions with an international element, which automatically raise the question of which is the applicable law to the transaction as the laws of different countries may be eligible for application. If, for example, a Kosovar businessperson signs a sales contract with a Slovenian counterpart in Germany to deliver certain goods produced in Albania to a construction site in Austria, determining the applicable law might turn into a very complicated undertaking.

Based on the principle of party autonomy, the parties may determine themselves the law applicable to their contract.[11] Such choice of law is not permitted only in the case of a purely national transaction where there is no international element. The parties to an international transaction can make a choice of law when they sign the contract or when the dispute emerges, if the choice of law is not contrary to public policy or mandatory national law.[12] This is why one usually finds in a contract a choice of law clause next to an arbitration clause. The choice of law applicable to the substance may include national law, international law and so-called transnational law, or *lex mercatoria*, including trade usages and even religious law, or a combination thereof.

The choice of law may be either explicit or by implication.[13] What matters is the intention of the parties, which, even if not explicitly stated in the contract, must be inferred from the terms of the contract by applying standard methods of contract interpretation. A possible indicator for an implied choice of law is the parties' choice of the seat of the arbitration which may be regarded as an implied choice of law of the seat of arbitration as the law applicable to the substance of the dispute. However, this must be treated with caution as the choice of the seat of arbitration may have been made for reasons other than related to a choice of law, and can therefore not be interpreted automatically as an implied choice of law.

In the absence of a choice of law by the parties, an arbitral tribunal must determine which law will apply to the substance of the dispute. National courts are usually required to apply *ex officio* private international law (conflict of laws) rules to determine the applicable law.[14] Private international law is, contrary to its denomination, part of the national legislation, and may include international agreements and EU law, which apply directly either as they are self-executing or because they have been transposed into national law.[15] With respect to contracts, the most common rule is that the contract is governed by the law of the country with which it is most closely connected.[16] The presumption is that the contract is most closely connected with the country where the party who is to effect the performance, which is characteristic of the contract, has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate, its central administration.[17]

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The key question is if an arbitral tribunal, like a national court, is required to apply rules of private international law to determine the applicable law to the substance of the dispute if the parties failed to make an explicit or implied choice of law. It seems to be

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11 UNCITRAL Rules, Art. 33.1; ICC Rules, Art. 17.1; see also Tweeddale, A., Tweeddale, K., Arbitration of Commercial Disputes, Oxford University Press, New York. 2007, p. 181.

12 Rome Convention on the Law Applicable to Contractual Obligations (hereinafter the "Rome Convention"), Art. 3.3

13 Rome Convention, Art. 3.1.

14 Rauscher, T., Internationales Privatrecht, C.F. Müller, Heidelberg. 2012, p. 2.

15 Rauscher, p. 19-30.

16 Rome Convention, Art. 4.1.

17 Rome Convention, Art. 4.2.

established theory and practice that, unlike a national court, an arbitral tribunal is not required to apply the private international law rules of the country where the seat of the arbitration is[18] or that it may apply the law, which is determined by the private international law rules, which the arbitral tribunal considers to be applicable[19]. The arguments advanced in favor of this view are that the choice of the seat of arbitration may be made for reasons other than concerning the applicable law to the substance of the dispute and that the arbitral tribunal should seek the common intention of the parties to determine the law applicable to the substance.[20] This gives an arbitral tribunal the authority to determine the applicable law at its own discretion.

This is an unsatisfactory solution for a number of reasons. First, if the parties had intended to make a choice of law, they would have done so either explicitly or by implication. Private international law applies exactly then when there is no such identifiable intention of the parties. Allowing the arbitral tribunal to seek the intention of the parties where there is no explicit or implied statement of such intention results inevitably in an arbitrary decision of the arbitral tribunal. Second, the choice of the seat of arbitration is of a legal nature and not just a technical matter. The designation of the seat of arbitration is legal insofar as it implies a choice of law concerning the arbitral proceedings. One can therefore not say that the designation of the seat of arbitration has no legal significance. Third, private international law is as much national law as the law of contracts or the law of torts which the arbitral tribunal applies to the substance of the dispute. Even where there is a contract, there may be issues where the arbitral tribunal would have to resort to national law to fill gaps in the contract. In a tort case, the arbitral tribunal would have to apply national law in its entirety given the absence of a contractual arrangement between the parties. Strictly legally speaking, private international law rules also apply to purely national transactions, only that the result of applying private international law is that national law will apply.[21] When applied to transactions with an international element, the result may be that a foreign law has to be applied. Since private international law is as much national law as the law of contracts or torts, why may an arbitral tribunal disregard the former but be required to apply the latter? Fourth, the very purpose of private international law is to identify the legal order, which is the most suitable to the substance of the dispute when the parties fail to make a choice of law, to facilitate international harmony and consistency of decisions and to ensure legal certainty.[22] These are objectives that should also guide arbitral proceedings. If arbitral tribunals were to disregard private international law and be free to select the applicable law more or less arbitrarily, different arbitral awards concerning similar disputes made in the same country may result in different applicable laws which would frustrate the very purpose of legal certainty and harmony of decisions. In view of these arguments, it may be more appropriate for arbitral tribunals to also apply the national rules on private international law rather than arbitrarily determine the law applicable to the substance of the dispute.

Conclusion

If Kosovo intends to have legislation, which satisfactorily addresses international commercial arbitration and which could make Kosovo an attractive seat for such arbitration, it should address in its legislation questions concerning the law applicable to the arbitration agreement, the arbitral proceedings and if arbitral tribunals should apply private international law when determining the law applicable to the substance of the dispute

If Kosovo intends to have legislation, which satisfactorily addresses international commercial arbitration and which could make Kosovo an attractive seat for such arbitration, it should address in its legislation questions concerning the law applicable to the arbitration agreement, the arbitral proceedings and if arbitral tribunals should apply private international law when determining the law applicable to the substance of the dispute. Such legislation should be guided by the objective to ensure legal certainty, to allow for party autonomy where not inconsistent with the mandatory laws of the seat of arbitration, and to facilitate the recognition and enforcement of arbitral awards. The above considerations also show that private international law matters in international commercial arbitration and that it should not be neglected if arbitral awards are expected to contribute to consistent decision-making and to avoid perceptions or arbitrariness.

18 Blackaby et. al., p. 234.

19 Tweeddale, A. et al., p. 205.

20 Blackaby et al., p. 234.

21 Rauscher, p. 2.

22 Rauscher, pp. 15-18.

The International Legal Framework Regulating Electronic Commerce and Online Mediation*

Dr. Jur. Ihab Amro**

Dr. Jur. Ihab Amro is an assistant professor of private law at Sultan Qaboos University in Oman, and a practicing lawyer and arbitrator. He holds PhD from the Athens Law School in Greece awarded in early 2011. He has published several books in both Arabic and English, including a book under Cambridge Publishing in UK in early 2014. In addition, he has published articles in numerous international peer--reviewed law journals, including the Hague Yearbook of International Law, the Arbitration Journal of the Chartered Institute of Arbitration in UK, the VINDOBONA Journal of International Commercial Law and Arbitration, and the Slovenian Arbitration Review. He is fluent in English, Greek, German and French. He has also an intermediate level in both Italian and Hungarian. Currently, he is working, *inter alia*, on a post-doctoral research on Online Disputes Resolution.

Introduction

Nowadays, technology as part of globalisation and the knowledge economy plays a very important role in the global economy, including the digital economy. The Internet has become a manifold resource for most people around the world, including academics, researchers, students, consumers, and traders, whether they be individuals or companies. In cross-border commercial transactions, the Internet is deemed a major tool for both consumers and businesses, as businesses can use the Internet for marketing and selling their products, while consumers can shop and buy low-cost products online. The Internet has stimulated small, medium, and large companies to contribute to free cross-border trade, and to secure places in the global markets, including online 'digital' markets. Apart from that, the Internet helps parties, either businesses or consumers, settle any disputes that may arise out of, or in connection with, their commercial transactions online. To give a practical example on e-commerce transactions: an Italian consumer may purchase a product from a German company *via* an online market 'website' originating in the UK using an Austrian credit card or pre-paid card. Because of the increasing importance of information technology generally, and the Internet particularly, in the global economy over the last two decades, a hybrid system that consists of alternative dispute resolution techniques ('ADR') and information technology has been created, i.e. online dispute resolution ('ODR'), which relates directly to online markets as part of the digital economy, as stated above.

ODR is deemed the most effective and flexible method for solving Business to Business ('B2B') and Business to Consumer ('B2C') e-commerce disputes. ODR goes a step farther than ADR techniques, including mediation. This form of dispute resolution, also known as 'Internet Justice', depends on an e-mail agreement between the parties. In addition to online arbitration, online mediation is a major part of ODR. In online mediation ('e-mediation' or 'cyber-mediation'), mediators conduct the process by e-mail exchanges, chat rooms, and video-conferencing. They rely on documentary evidence to be sent *via* electronic means ('e-documents') with, or maybe without, an oral hearing. E-mediation is a technique used for solving e-commerce disputes, especially B2B and B2C e-commerce disputes, and it might also be used for

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solving traditional commercial disputes[1]. E-mediation might also be used for resolution of non-commercial disputes, including family law disputes, employment disputes, and academic disputes.[2]

The traditional techniques of dispute resolution, including traditional mediation, are unable to meet the developments and the challenges of the new technologies generally, and of e-commerce transactions particularly

The traditional techniques of dispute resolution, including traditional mediation, are unable to meet the developments and the challenges of the new technologies generally, and of e-commerce transactions particularly. That is attributed to the fact that the world has dramatically changed during the last two decades, and therefore, e-commerce transactions as part of the digital economy are playing an essential role in the development of the global economy nowadays.[3]

Online mediation basically depends on online dispute resolution providers (centres)

Online mediation basically depends on online dispute resolution providers (centres) ("ODRPs")[4] that aim to facilitate the e-mediation process. One example of an ODRP' that facilitates the conduct of the online mediation process is the Chamber of Arbitration of Milan, *Camera Arbitrale di Milano*,[5] which administers e-mediation under its own *ResolviOnline* Rules of 2015.[6] This is a special branch of the chamber of commerce of Milan that specializes in commercial dispute resolution, and provides some online dispute resolution services, particularly e-mediation, for settling both domestic and international disputes arising out of commercial contracts. The online mediation process is administered by means of a chat line or a discussion forum using a private area of the Internet site accessible only by the parties through a user name and a password, the mediator, and the mediation chamber official in charge of the service.[7] In their own private area, the parties are able to communicate with the aid of the mediator, setting out their own cases in full, expressing their demands, and assessing their respective positions in an attempt to find a satisfactory solution for both parties by hearing one another out. Through its online dispute resolution service '*ResolviOnline*', The Milan Chamber of Commerce aims to settle commercial disputes involving consumers and/or companies, with special reference to those originating from the Internet and e-commerce. The service is provided irrespective of the nationality of the parties nor the economic value of the dispute.[8] *ResolvieOnline* is a double-track online dispute resolution platform designed for small or long distance transactions. Through this service, The Milan Chamber of Commerce provides parties an opportunity to solve their dispute online through mediation. They can discuss all pertinent facts with each other and with the mediator who will assist in finding a solution to the dispute. In addition, parties can ask the expert for a non-binding solution of the case based on the documents sent to him by either party. Once a solution has been reached, it becomes a contract, and it can be enforced as a contract.

To give another example, the *Mediation International* provides online dispute resolution services to many organisations in Spain and across Europe and assists them in resolving conflicts with their clients. *Mediation International* has developed a cost-effective service, which provides a proportionate method of

1 *See* Ganeles, C., Comment: Cybermediation: A New Twist on an Old Concept, Albany Law Journal of Science & Technology 2002 (12 Alb. L.J. Sci. & Tech. 715), p. 8.

2 On the use of online mediation for resolution of non-commercial disputes, see Braeutigam, A., Fusses That Fit Online: Online Mediation in Non-Commercial Contexts, Appalachian Journal of Law, spring 2006, 5 Appalachian J. L. 275.

3 Braeutigam, A., sums up the main differences between online mediation and traditional mediation as follows: "The most significant differences between online and traditional mediation is that online communication is textual and the participants are not in the physical presence of one another. Some services supplement the textual communications with videoconferencing; however, there are bandwidth issues for broadcast-quality videoconferencing that affect its utility. Consequently, online mediators and participants cannot rely on the non-verbal cues of body language and facial expressions, nor the verbal intonations that supply important cues in face-to-face mediation. Further, text is often interpreted differently than words spoken in the shared context of face-to-face communication". *See Ibid.* See also for the benefits and drawbacks of online mediation: Ganeles, C., *supra* fn. 1, at p. 8.

4 It is important to indicate that Online Dispute Resolution Providers differ from IT Service Providers such as DXC, which is a technology company that provides information technology and consulting services to businesses and governments. As an IT Service Provider, DXC helps other big companies and banks to create software systems in order to analyse data, including persona data, so that those companies and banks can know more about their consumers, and accordingly provide offers that meet their needs and demands. See http://www.dxc.technology/ (09. 09. 2017).

5 The name "Chamber of Arbitration" dates back to the period in which the Chamber provided only arbitration services. It has also provided mediation services since 1996 and online mediation services since 2001. Currently, the number of cases settled through mediation is higher than the number of cases settled through arbitration.

6 On the ResolviOnline Rules, see http://www.camera-arbitrale.it/Documenti/risolvionline_eng-rules.pdf (09. 09. 2017). On how to apply for mediation, and on related information on the list of mediators, rules and fees, as well as an online dispute resolution clause, see: *Camera Arbitrale di Milano* (Mediation), available at: http://www.camera-arbitrale.it/en/Mediation/Forms.php?id=376 (09. 09. 2017).

7 *Ibid.*

8 *See* ResolviOnline Rules of 2015, Art. 1.

dispute resolution for all types of consumer disputes.[9] Through providing innovative technology for organisations across the globe to manage and resolve conflict, *Mediation International* aims to improve access to online mediation for everyone, and propel online mediation as an innovative and forward thinking method of dispute resolution.[10] Through its service *Mediation Online, Mediation International* provides state of the art online mediation technology for organisations, independent mediators, mediation providers, and corporate houses to set up, manage and run their own in-house online mediation service. One of the significant benefits that this service offers to counsels and their clients, is that any dispute can be settled anywhere in the world, as long the parties have a 3G Connection.[11] *Mediation International* offers online mediation services in situations where the cost of physical meetings is high. Online services, through *Mediation International*, are provided at very low cost, and prorated to the amount of the claim and counter claim.[12]

To give an additional example: the 'Olive Branch' is an Irish online dispute resolution platform which aims, through its online mediation service, to prevent small complaints, either domestic or international, from becoming claims in courts.[13]

In this article, I will deal in detail with the international legal framework regulating both electronic commerce ('e-commerce') and online mediation ('e-mediation'), considering that both online mediation, as part of Online Dispute Resolution Techniques ('ODR'), and electronic commerce, as part of the digital economy, are connected in practice. This is attributed to the fact that e-mediation is mainly used for resolution of disputes arising out of, or in connection with, e-commerce transactions.

This international legal framework includes both hard laws and soft laws, i.e. the EU Regulation on Online Dispute Resolution for Consumer Disputes of 2013,[14] and the Technical Notes on Online Dispute Resolution of 2016 of the United Nations Commission on International Trade Law ('UNCITRAL'), as well as The UNCITRAL Model Laws on both electronic commerce and electronic signatures.

This article shall exclude the United Nations Convention on the Use of Electronic Communications in International Contracts ('ECC') from the scope of research because of the very limited number of states that have acceded to this Convention so far.[15]

This article will rely on a methodology that focuses, *inter alia*, on the main legal issues relating to international legal instruments regulating both electronic

This international legal framework includes both hard laws and soft laws, i.e. the EU Regulation on Online Dispute Resolution for Consumer Disputes of 2013, and the Technical Notes on Online Dispute Resolution of 2016 of the United Nations Commission on International Trade Law ('UNCITRAL'), as well as The UNCITRAL Model Laws on both electronic commerce and electronic signatures

9 *See* http://mediationinternational.eu/index.php/adr-a-mediation/137-online-dispute-resolution-online (09. 09. 2017).

10 *Ibid.*

11 *Ibid.*

12 *Ibid.*

13 *See* http://www.anolivebranch.com/ (09. 09. 2017).

14 This article deals with the EU Regulation on Online Dispute Resolution for Consumer Disputes of 2013 as an international instrument because the scope of application of this Regulation in practice is international, while theoretically the scope of its application is regional. That is, the EU member states are representatives of many of the main common law and civil law countries in the world, and this reflects the possible theoretical universal application of EU Regulations in practice. Apart from that, this Regulation applies to all consumers who reside inside the EU countries regardless of their nationalities, including those of non-European countries, either developing countries or developed countries. Even so, this article does not deal with other EU legislations that regulate both e-commerce and mediation because the above Regulation on ODR has a direct impact on online dispute resolution, especially online mediation, considering the fact that that the UNCITRAL have promulgated model laws as international legal instruments regulating both international commercial conciliation 'mediation' and electronic commerce, which may justify excluding other EU regulations and directives on E-Commerce and on Mediation from the scope of this research.

15 John, G., explains that as follows: "While the Convention is acceptable, it is arguably not really needed in U.S. law since much of it is already there. American lawyers have moved on from electronic records and signatures to the challenges of electronic payment systems and electronic evidence, notably e-discovery, among other issues. The principal argument for U.S. ratification is to serve as an example to other countries whose laws have not been made compatible with e-communications. It is sometimes awkward legally to deal with such countries if their law applies to the transaction because the use of e-communications creates uncertainty. It would be helpful to the United States to have the Convention widely adopted, to lessen this uncertainty. However, a number of such countries are waiting to see what the United States does before moving themselves to ratify. If the United States does not ratify, it may appear that the United States thinks the Convention is not appropriate or safe. In that case, the other countries may not adopt it either. It is up to the United States to make the first move [...] Considerations of federal-state relations, and the decision of the Supreme Court have added some complexity to the formerly straightforward process of adopting international norms". See his article: Implementing the Electronic Communications Convention: Ratification Isn't What It Used to Be, Business Law Today, Volume 18, Number 32009/ available at: https://apps.americanbar.org/buslaw/blt/2009-01-02/gregory.shtml (09. 09. 2017), also at: http://lawlib.wlu.edu/CLJC/index.aspx?mainid=1046&issuedate=2009-01-23&homepage=no (09. 09. 2017). On the limited number of the Contracting States, see: http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html (09. 09. 2017).

commerce and online mediation. However, there are other legal issues that may not create legal obstacles to e-commerce in practice. In addition, this article will rely on a comparative study between several jurisdictions, including the European Union and the United States jurisdictions, in theory and in practice.

The MLEC consists of two parts that include four chapters mainly focusing on definitions, variation by agreement, recognition of data message, incorporation by reference, writing, signature, original, communication of data message, and compatibility of the Model Law with EU law

The International Legal Framework Regulating Electronic Commerce Transactions

The UNCITRAL Model Law on Electronic Commerce of 1996

Overview

The UNCITRAL Model Law on Electronic Commerce (hereafter 'The MLEC') was enacted upon a resolution no. 51/162 of December 16, 1996 by the UN General Assembly at its 85th plenary meeting.[16] The MLEC aimed at improving the adequacy of national laws in a number of developing and developed countries concerning e-commerce transactions. Consequently, many developed and developing countries have adopted the MLEC as legal machinery for regulating e-commerce transactions in their own jurisdictions, and accordingly they have enacted laws on e-commerce based on the above MLEC.[17] Examples include the Electronic Transaction Bill of 1999 in Australia, the Electronic Communication Act of 2000 in the United Kingdom, the Electronic Transaction Act of 1998 in Singapore, and the Electronic Commerce Act of 2006 in Malaysia. This is because the MLEC is not in contradiction with national laws, including EU law[18] and United States domestic law, [19] which may require some formalities in certain contracts, including certain types of consumer contracts, and contracts of carriage of goods, especially the form requirement.[20]

The MLEC consists of two parts that include four chapters mainly focusing on definitions, variation by agreement, recognition of data message, incorporation by reference, writing, signature, original, communication of data message, and compatibility of the Model Law with EU law. Part One, entitled *Electronic Commerce in General*, consists of three chapters. Chapter One (Articles 1 to 4) includes general provisions relating to e-commerce such as the sphere of application, definitions, interpretation and variation by agreement. Chapter Two (Articles 5 to 10), entitled *Application of Legal Requirements to Data Messages,* deals with legal recognition of data messages, incorporation by reference, writing, signature, original, admissibility and evidential weight of data messages and retention of data messages. Chapter Three, entitled *Communication of Data Messages* (Articles 11 to 15), includes formation and validity of contracts, recognition by parties of data messages, attribution of data messages, acknowledgment of receipt and time and place of dispatch and receipt of data messages. Part Two, entitled *Electronic Commerce in Specific Areas,* includes one chapter. This chapter, entitled *Carriage of Goods,* which consists of

16 On the provisions of the Model Law on Electronic Commerce of 1996 and the Guide to enactment, see http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (09. 09. 2017).

17 On the large number of the countries, which have adopted the MLEC, see http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html (10. 09. 2017).

18 The EU Directive on Electronic Commerce of 2000 provides in Art. 9(1) that "Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means". On this Directive, see http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=EN (10. 09. 2017).

19 Overby, B., illustrates the influence of the Model Law on the U.S. domestic law through providing a practical example as follows: "The Model Law does not seek to intervene into the underlying substantive question concerning the issue of retaining the Statute of Frauds in United States sales law, even though the writing requirement sets the United States apart from international sales law. Rather, through its requirements that data messages be treated equally with traditional paper-based communications, the Model Law, if enacted by a state, merely would mandate that with respect to the 'writing' requirement and the 'signature' requirement in any Statute of Frauds, data messages provide an acceptable equivalent. A state, under the Model Law, thereby retains maximum authority over the fundamental issues of whether to require a writing, or record, in order to have an enforceable contract. At the same time, should an enacting state determine that data messages do not provide an adequate equivalent for a paper-based 'writing' in particular circumstances, the Model Law allows exclusion of those sorts of situations", see his article: UNCITRAL Model Law on Electronic Commerce: Will Cyberlaw Be Uniform? An Introduction to the UNCITRAL Model Law on Electronic Commerce, Tulane Journal of International and ComPtive Law, 1999, (7 Tul. J. Int'l & Comp. L. 219), at p. 3.

20 Article 11 of the Model law gives a national law a discretionary power to exclude some certain types of contracts from the scope of its application, as we will see below. In this, Para. (2) of Art. 9 of the EU Directive on E-Commerce gives Member States the right to exclude contracts of suretyship and on collateral securities as certain types of consumer contracts from the scope of the non-writing requirement. It reads: "Member States may lay down that paragraph 1 shall not apply to all or certain contracts falling into one of the following categories: ...(c) Contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession (d) Contracts governed by family law or by the law of succession". On this Directive, *see supra* fn. 18.

Articles 16 to 17, refers to actions related to contracts of carriage of goods and to transport documents regulating the use of a data message and the evidential value of a data message in contracts of carriage of goods. The MLEC further encompasses a guide that includes an introduction to the Model Law, Article-by-Article remarks, and history and background of the Model Law. The MLEC was amended in 1998 to add another article (Article 5 *[bis]*) and a guide to enactment, as stated above.

The MLEC aims to regulate the commercial use of modern means of communications and storage of information, that is, the MLEC aims to provide an international legal framework for cross-border electronic commerce transactions. Apart from that, the MLEC aims to establish a functional equivalence for the use of e-documents and e-signatures in the same manner and to the same legal effect as written documents and written signatures. In addition, the MLEC aims to create rules for the formation and the validity of e-contracts, and for the use of data messages and their evidential value before national courts.[21]

Legal Issues

The writing requirement

The main legal issue relating to the MLEC concerns the writing requirement that might be required by a national law, and whether a data message meets this requirement.

Under Article 6(1) of the MLEC, a data message meets the writing requirement that might be required by a national law if the information contained therein is accessible so as to be usable for subsequent reference.[22] The explanation of "writing" permits a broad interpretation of the term, covering a legal variety of data in digital form, provided that the data is accessible (computer data should be readable and interpretable) and usable (for human use including computer processing).[23] Moreover, a data message has the same functional weight of a written document before court under Article 9(1) of the MLEC, which provides "in any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence". In paragraph (2) of the same article, the MLEC provides that information in the form of a data message shall be given due evidential weight.

In addition, the MLEC has adopted in Article 11 a wide and modern concept of the form requirement. Under this article, the form requirement includes a "data message", aside from the traditional paper-based agreement, as we will see below.[24] However, paragraph (2) of the same article gives a national law a discretionary power to exclude certain types of contracts from the scope of its application, as stated above.[25]

Validity and enforceability of an offer and the acceptance of an offer expressed by means of a 'data message' in a national court

Under Article 11(1), entitled *formation and validity of contracts*, an offer and the acceptance of an offer expressed by means of a "data message" shall not be denied validity and enforceability in national courts. It reads:

> *"In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer maybe expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose".*[26]

The main legal issue relating to the MLEC concerns the writing requirement that might be required by a national law, and whether a data message meets this requirement

21 *See supra* fn. 16.

22 The MLEC, Art. 6(1).

23 *See* Vahrenwald, A., Law of Online Arbitration, CentreBar Publication, Munich et al, 2006, at p. 55.

24 Under Art. 2 (a) of the MLEC, "data message" means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy. Under the same article (b), "Electronic data interchange (EDI)" means the electronic transfer from computer to computer of information using an agreed standard to structure the information.

25 Para. 2 of Art. 11 reads: "The provisions of this article do not apply to the following: [...]". In this, Para. 80 of the Guide to Enactment of the MLEC provides an explanation of this exclusion, stating that: "During the preparation of paragraph (1), it was felt that the provision might have the harmful effect of overruling otherwise applicable provisions of national law, which might prescribe specific formalities for the formation of certain contracts. Such forms include notarization and other requirements for "writings", and might respond to considerations of public policy, such as the need to protect certain parties or to warn them against specific risks. For that reason, paragraph (2) provides that an enacting State can exclude the application of paragraph (1) in certain instances to be specified in the legislation enacting the Model Law". See *supra* fn. 16.

26 The MLEC, Art. 11(1).

One may note that through providing that an offer and the acceptance of an offer in contract formation may be expressed by means of a data message, the MLEC addresses the legal effect of data messages in particular substantive areas.[27]

To give a practical example from a MLEC country, in a case decided by the Second Intermediate People's Court of Shanghai on 21 October 2011 (hereafter 'the Court'), applying Articles 8, 9, 11 of the MLEC, the Court concluded that an e-mail was an allowable form of offer and acceptance in Chinese contract law. This case involved a dispute regarding a real estate purchase arrangement between a buyer who was a long-time resident of the United States and a Chinese agent. The buyer had purchased numerous real properties in Shanghai and had commissioned a local agent to assist in management of those properties, including purchase and maintenance of the property, making necessary payments, as well as the management of relevant funds and bank accounts. The dispute arose when the agent had transferred the funds, which were transferred by the buyer to the agent's general account in February 2009 into his personal equity trading account. The buyer requested that the funds be returned. The parties communicated by e-mails, which were submitted as evidence. The agent denied the content of the e-mail and argued that he was not the owner of the three e-mail accounts referred to in the case. He further argued that the e-mails did not reflect the actual circumstances and that the instability and alterability of the e-mails made them inadmissible in court. The Court denied the agent's claim, holding that:

> *"Both the Trial Court and the Appeal Court rejected the agent's claim. It was held that an e-mail was an allowable form of offer and acceptance in the Chinese contract law. The e-mails sent by the buyer were from a public mail server and they were notarized. The agent did not provide any evidence to prove that the actual circumstances were not consistent with the content of those e-mails, nor did he request an investigation on accuracy of these emails. Moreover, the content of the e-mails submitted by the buyer matched with the bank account transaction records and witness' inquiry records. While one of the e-mails sent by the agent was from a third party's e-mail account, it still included the agent's signature. The buyer's request of returning the funding in question was upheld".*[28]

Also, Article 12(1) of the MLEC deals with the recognition of a data message by parties. It reads: "*As between the originator and the addressee of a data message, a declaration of will or other statement shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message*". In addition, Article 17 of the MLEC, entitled *Transport Documents*, provides that where the law requires that any action related to contracts of carriage of goods, as listed in Article 16 of the same Model Law, be carried out in writing or by using a paper document, that requirement is met if the action is carried out by using one or more data messages.[29] In this, one may emphasise that regulation of data messages under the MLEC is most comprehensively addressed in the area of carriage of goods.[30]

The evidential value of an e-signature

In addition to the above two legal issues relating to the MLEC, there is an issue that concerns the evidential value of an e-signature, and whether a data message meets an original signature requirement in national courts under the MLEC.

It is important to indicate first that the MLEC gives an e-signature the same evidential value as an original "hand-written" signature under Article 7

It is important to indicate first that the MLEC gives an e-signature the same evidential value as an original "hand-written" signature under Article 7, entitled *Signature*, which provides:

> *"Where the law requires a signature of a person, that requirement is met in relation to a data message if: (a) A method is used to identify that person and to indicate that person's approval of the information*

27 *See* Overby, B., *supra* fn. 19.

28 *See* case no. 1149, 2011, this decision is searchable in English at: http://www.uncitral.org/clout/index.jspx (10. 09. 2017).

29 According to Article 16 of the MLEC, those actions include, *inter alia*, furnishing the marks, number, quantity, or weight of goods, stating or declaring the nature or value of goods; issuing a receipt for goods, confirming that goods have been loaded, notifying a person of terms and conditions of the contract, giving instructions to a carrier, claiming delivery of goods, authorizing release of goods, giving notice of loss of, or damage to, goods, giving any other notice or statement in connection with the performance of the contract; undertaking to deliver goods to a named person or a person authorized to claim delivery, granting acquiring, renouncing, surrendering, transferring or negotiating rights in goods, acquiring or transferring rights and obligations under the contract.

30 *See* Overby, B., *supra* fn. 19, at p. 3.

contained in the data message; and (b) That method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances including any relevant agreement [...]"[31]

Fernando Piera comments on this article comparing between the E.U. and the United States jurisdictions as follows:

"In attempting to resolve the issues surrounding the legal effect of electronic signatures and authenticated electronic documents, many countries have been influenced by article 7 of the United Nations Commission on International Trade Law (UNCITRAL). This 'Model Law' on electronic commerce states that the requirements of a signature are satisfied with respect to a data message if: 1) the method is used to identify the signer and to indicate that person's approval of the information contained in the message, and 2) the method is as reliable as is appropriate for the purpose for which the message was generated or communicated. In common law jurisdictions, there is nothing about an 'electronic signature' that is significantly different from a signature conveyed by other generally accepted means in commercial practice which are ordinarily accepted by most common law courts. The situation in civil law jurisdictions tends to be more complex, given that civil law has a more prescriptive approach to methods of proof and authentication".[32]

On this matter, one may observe that the broad concept of the electronic signature contained in the MLEC permits a large variety of facts to be considered as sufficient in the sense of the Law. An electronic signature will thus generally suffice to provide the authenticity of the document and the signatory.[33] In this context, it should be mentioned the UNCTRAL has enacted a model law specific to e-signatures in 2001, which deals in detail with those issues relating to the use of digital signatures and their legal effect in national courts, as we will see below.

The requirements of an original form

Finally, and possibly most importantly, a legal issue relating to the MLEC concerns the validity of a data message to meet the requirements of an original form as stipulated by some national laws.

It should be emphasised that as far as originality of an e-document is concerned, the MLEC provides in Article 8(1) that a data message shall suffice for this purpose. It reads:

"Where the law requires information to be presented or retained in its original form, that requirement is met by a data message if:

a.) there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and

b.) where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented ".[34]

On this article, some commentators point out that the preservation of originality of documents may be important concerning evidence. In case of paper-based documents, adequate and good storage conditions should be maintained. In case of electronic documents, their integrity may possibly be proved by an unalterable registration or a printout, which shows the time of its making.[35]

Assessment

In the light of above analysis, it should be observed that the MLEC adopts a modern legal regime for facilitating e-commerce, including the use of e-contracting between contractual parties. Furthermore, the MLEC may constitute, among other model laws and conventions, international legal machinery for resolution of e-commerce disputes through online dispute resolution techniques, particularly online mediation.

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31 The MLEC, Art. 7(1).

32 *See* his article: International Electronic Commerce: Legal Framework at the Beginning of the XXI Century, International Trade Law Journal, 2001 (10 Currents Int'l Trade L.J.8), at p. 3.

33 *See* Vahrenwald, A., *supra* fn. 23, at p. 56.

34 The MLEC, Art. 8(1).

35 *See* Vahrenwald, A., *supra* fn. 23, at p. 56.

The UNCITRAL Model Law on Electronic Signatures of 2001

Overview

As a consequence of the enactment of the Model Law on Electronic Commerce in 1996 as international legal machinery facilitating the use of e-commerce, the UNCITRAL has promulgated the Model Law on Electronic Signatures (hereafter "The MLES") in 2001 in order to meet the new developments in the field of e-commerce, taking into account the importance of the new technologies used for personal identification in e-commerce contracts. Referring to Article 7 of the Model Law on Electronic Commerce of 1996 in its enacting the Model Law on Electronic Signatures, the UNCITRAL aimed to give a legal effect to digital signatures as equivalent to handwritten signatures, and it also aimed to facilitate the use of an e-signature in different national jurisdictions.[36]

The MLES, which has been adopted in more than thirty countries,[37] includes 12 articles that relate to the sphere of application, definitions, equal treatment of signature technologies, interpretation, variation by agreement, compliance with a requirement for a signature, conduct of the signature, conduct of the certification service provider, trustworthiness, conduct of the relying party, and recognition of foreign certificates and electronic signatures. The MLES is accompanied by a guide to enactment, which provides background and explanatory information to assist states in preparing the necessary legislative provisions on e-signatures.[38]

Legal Issues

Legal requirements provided by national laws

When dealing with the MLES, the main legal issue shall concern the legal requirements provided by national laws, and whether an electronic signature meets those requirements.

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Under Article 6(1) of the MLES, where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used that is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

To give a practical example from a MLES country on this matter, in a case decided by the Nancy Court of Appeal in France 14 February 2003,[39] the Court of Appeal set aside the decision of the court of First Instance, ruling that the electronic signature had probative value. The Court of Appeal came to that conclusion recalling that, pursuant to Article 1316-4 of the French Civil Code and Decree No. 2001-272 of 30 March 2001, an electronic signature "is a reliable form of identification that guarantees its connection to the act that it accompanies. When an electronic signature is created, the identity of the signatory assured and the integrity of the act guaranteed, it shall be presumed reliable unless proved otherwise".

This case concerned the admissibility of a credit contract signed with an electronic signature as evidence of proof of transaction.

By confirming that the number of the supplementary agreement was included in the electronic document proving the transaction, the Court of Appeal established the link between that document, which contained the borrower's electronic signature, and the third supplementary agreement of 4 September 2008. As there was no contradictory evidence, the Court of Appeal decided that the signature should be presumed reliable and it ruled that the supplementary agreement signed with the electronic signature was valid. The proceedings were not barred and the Court ordered the borrower to repay the loan with interest.[40]

36 On Art. 7(1) of the Model Law on Electronic Commerce of 1996, see *supra* discussion p. 10.

37 On the states, which have already adopted the MLES, see http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_status.html (10. 09. 2017).

38 For the provisions of the Model Law on Electronic Signatures and the guide to enactment, see http://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf (10. 09. 2017).

39 Case 1308: MLES 6 France: Nancy Court of Appeal, Decision No. 442/12 Company CB, successor in interest to Company SPP, v. W.M. 14 February 2013, Searchable in English via Case Law on UNCITRAL Text (Clout), available at http://www.uncitral.org/clout/index.jspx (10. 09. 2017). On this decision in French, see CA Nancy, 14 févr. 2013, n° 12/01383, available at: https://www.doctrine.fr/d/CA/Nancy/2013/R67252FD1C20D30013D41 (10. 09. 2017).

40 *Ibid.*

Meaning and efficacy of the term 'Certificate'

It is important to note that The MLES draws up a clear definition for the term "certificate" stating that it means a data message or other record confirming the link between a signatory and signature creation data.[41] For controlling the conduct of the signatory, the certification service provider, and the relying party, the MLES includes provisions that stipulate duties and caveats that each of the above parties must consider when signing, certifying or relying on an e-signature.[42]

To give an example on accredited certification service providers: The Deutsche Post (German Post) [43] was a certification service provider until late 2012 where interested users, including companies and individuals, could apply online for obtaining a digital signature. At the EU level, Member States have established their trusted lists of supervised/accredited certification service providers for secure cross-border electronic commerce transactions, and central building of digital single market.[44]

Recognition of foreign certificates and electronic signatures

The MLES deals in a liberal manner with the recognition of foreign certificates and electronic signatures based on the principle of substantive equivalence, regardless of the place of origin of the foreign signature pursuant to Article 12 of the same Model Law.[45]

However, national laws may stipulate some requirements for recognition of foreign certificates and electronic signatures. On this matter, Luca Castellani states that:

> *"For instance, article 12 MLES establishes a test of substantive equivalence for cross-border recognition of electronic signatures. Article 12 MLES suggests that, when an electronic signature originating from a different jurisdiction needs to be recognised, the former may not be discriminated against on the basis of its foreign origin but should be evaluated against the same requirements of reliability as an electronic signature created in the jurisdiction where it must be recognised. This is in line with the approach adopted in Article 7(1)(b) MLEC. Nonetheless, domestic laws on electronic signatures often require a formal act of recognition of a foreign electronic signature by virtue of a general reciprocity agreement between jurisdictions, of a cross-certification agreement between a foreign certification service provider and a provider accredited in the country where the signature needs to be recognised, or a combination of the two. This approach may create significant obstacles to the cross-border use of electronic signatures, which are a key element in establishing trust in cross-border electronic commerce".*[46]

Assessment

The MLES provides a legal effect to documents or messages transmitted and signed over the Internet. Apart from that, it provides a legal certainty to the use of e-signatures equivalent to handwritten signatures in national legislation. In terms of practice, the MLES gives digital signatures the same evidential value given to handwritten signatures before national courts, especially in case of e-commerce disputes between contracting parties. On this matter, some commentators point out that as part of common principles there is no

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41 The MLES, Art. 2(b).

42 The MLES, Arts. 8, 9, 10, and 11.

43 On the reasons for the removal of digital signatures from E-Postbrief Services, see: http://postandparcel.info/50097/news/companies/deutsche-post-to-remove-digital-signatures-from-e-postbrief-service/ (10. 09. 2017).

44 *See* https://ec.europa.eu/digital-single-market/en/news/eu-trusted-lists-certification-service-providers (10. 09. 2017).

45 Article 12 of the MLES reads:
"*1. In determining whether, or to what extent, a certificate or an electronic signature is legally effective, no regard shall be had:*
(a) To the geographic location where the certificate is issued or the electronic signature created or used; or
(b) To the geographic location of the place of business of the issuer or signatory.
2. A certificate issued outside [the enacting State] shall have the same legal effect in [the enacting State] as a certificate issued in [the enacting State] if it offers a substantially equivalent level of reliability.
3. An electronic signature created or used outside [the enacting State] shall have the same legal effect in [the enacting State] as an electronic signature created or used in [the enacting State] if it offers a substantially equivalent level of reliability.
4. In determining whether a certificate or an electronic signature offers a substantially equivalent level of reliability for the purposes of paragraph 2 or 3, regard shall be had to recognized international standards and to any other relevant factors.
5. Where, notwithstanding paragraphs 2, 3 and 4, parties agree, as between themselves, to the use of certain types of electronic signatures or certificates, that agreement shall be recognized as sufficient for the purposes of cross-border recognition, unless that agreement would not be valid or effective under applicable law".

46 *See* Castellani, L., The United Nations Electronic Communications Convention –Policy Goals and Potential Benefits-, Korean journal of international trade and business law, Seoul, 2010, at p. 6.

need for formal digital signature, and that clear assent as part of any e-mail suffices.[47]

The MLES is deemed an effective instrument for the harmonisation, and the modernisation of international commercial law,[48] including e-commerce. In this, some commentators state that the UNCITRAL Model Laws on Electronic Commerce and on Electronic Signatures have an influence on the harmonisation and the modernisation of pertinent national laws, especially in the Arab region.[49] Even so, one may argue that the world has changed and digitalisation has recently entered a new stage that does not find itself reflected in the existing UNCITRAL texts regulating e-commerce and e-communications, including the Model Law on Electronic Commerce, and the Model Law on Electronic Signatures[50] This new stage of digitalisation includes, *inter alia*, smart contracts, Internet of Things, including smart goods and smart packaging, virtual currencies, and Blockchain technologies.[51]

In addition to the instruments regulating cross-border e-commerce transactions, there is a set of instruments that regulate or relate to the use of ODR techniques, including e-mediation. In the following paragraphs, I will deal with these instruments, starting with the EU Regulation on ODR

47 *See* Guimarães Pereira, C., and Moniz de Aragao, A., Electronic communications: Should CISG AC Opinion 1 (2003) be updated?, in Schwenzer, I., and Spagnolo, L., The Electronic CISG: 7th Annual MAA Schlechtriem CISG Conference, Eleven International Publishing, The Hague, 2017, pp. 69-95.

48 For more details on the international legislative instruments, see Marburg, R., Model Laws as Instruments for Harmonization and Modernization, The 50th Anniversary Congress of the United Nations Commission for International Trade Law 'UNCITRAL', available at: http://www.uncitral.org/pdf/english/congress/Papers_for_Programme/34-WOLFF-Model_Laws_as_Instruments_for_Harmonization_and_Modernization.pdf. (10. 09. 2017).

49 Mattar, M., indicates that most Arab laws on electronic commerce are based on the UNCITRAL Model law on Electronic Commerce of 1996 and the UNCITRAL Model Law on Electronic Signatures of 2001 'inclusion by integration'. For instance, the law of Qatar No. 16 of 2010 regarding Electronic Transactions and Commerce provides that information in a contract of a transaction shall not be denied effect, validity, or enforcement on the grounds that it is in the form of a data message. See his article: Harmonisation of National Legislation through Model Laws: From the United Nations Commission on International Trade Law to the League of Arab States and the Gulf Cooperation Council, The 50th Anniversary Congress of the United Nations Commission on International Trade Law 'UNCITRAL', available at: http://www.uncitral.org/pdf/english/congress/Papers_for_Programme/58-MATTAR-Harmonization_of_National_Legislation_through_Model_Laws.pdf, at p. 6. (10. 09. 2017).

50 *See* Wendehorst, C., Reconsidering Legal Instruments in the Light of a New Stage in Digitalisation, The 50th Anniversary Congress of the United Nations Commission for International Trade Law 'UNCITRAL', available at: http://www.uncitral.org/pdf/english/congress/Papers_for_Programme/142-WENDEHORST-Legal_instruments_in_the_light_of_a_new_stage_in_digitalisation.pdf (10. 09. 2017).

51 On smart contracts, Blockchain, and virtual currencies, see De Caria, R., A Digital Revolution in International Trade? The International Legal Framework for Blockchain Technologies, Virtual Currencies and Smart Contracts: Challenges and Opportunities, available at: http://www.uncitral.org/pdf/english/congress/Papers_for_Programme/5-DE_CARIA-A_Digital_Revolution_in_International_Trade.pdf (10. 09. 2017).

On that basis, there might be a need for amendment of both model laws in order to meet the above new challenges and developments.

The International Legal Framework Regulating Online Mediation

In addition to the instruments regulating cross-border e-commerce transactions, there is a set of instruments that regulate or relate to the use of ODR techniques, including e-mediation. In the following paragraphs, I will deal with these instruments, starting with the EU Regulation on ODR.

The EU Regulation on Online Dispute Resolution for Consumer Disputes of 2013

Overview

The European Parliament and the Council of Europe have promulgated a new regulation, No.524/2013 of 21 May 2013, entitled "Regulation on Online Dispute Resolution for Consumer Disputes" (hereinafter 'ODR Regulation').[52] This regulation, which entered into force on 9 January 2016,[53] amends Regulation 2006/2004 and Directive 2009/22/EC.

The ODR Regulation consists of three chapters and includes 22 articles. Chapter one, entitled *General Provisions*, deals with subject matter, scope, relationship with other Union legal acts, and definitions. Article 1 of this chapter provides that the purpose of this regulation is to contribute to the proper functioning of the internal market through the achievement of a high level of consumer protection, and in particular of its digital dimension by providing a European ODR Platform facilitating the independent, impartial, transparent, effective, fast and fair out-of-court resolution of disputes between consumers and traders online. Article 2 deals with the scope of the regulation and provides, *inter alia*, that this regulation shall apply to the out-of-court resolution of disputes concerning

52 On this regulation, which is also known as Regulation on Consumer ODR, see http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0524&from=EN (10. 09. 2017).

53 Except Arts 2(3) and 7(1) and (5), which came into force from 9 July 2015, and Arts 5(1) and (7), 6, 7(7), 8(3) and (4) and 11, 16 and 17, which came into force from 8 July 2013.

contractual obligations stemming from online sales or service contracts between a consumer resident in the Union and a trader established in the Union through the intervention of an ADR entity listed in accordance with Article 20(2) of Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes,[54] and which involves the use of the ODR Platform. Article 3 states that this regulation shall be without prejudice to Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.[55] Article 4 provides some important definitions, including the definition of the consumer, trader, sales contract, service contract, online sales or service contract, online marketplace, electronic means, alternative dispute resolution procedure, alternative dispute resolution entity, complainant party, respondent party, competent authority, and personal data. Chapter two, entitled *ODR Platform*, deals with the establishment of the ODR Platform, testing of the ODR Platform, network of ODR contact points, submission of a complaint, processing and transmission of a complaint, resolution of the dispute, database, processing of personal data, data confidentiality and security, consumer information, and role of the competent authorities. Chapter three, entitled *Final Provisions*, refers to committee procedure, exercise of the delegation, penalties, amendment to Regulation (EC) No 2006/2004, amendment to Directive 2009/22/EC, reports, and entry into force.

Legal Issues

The main legal issue pertaining to the ODR Regulation concerns the validity of this Regulation to establish a legal machinery for resolution of B2C e-commerce disputes through online mediation.

On this issue, it should be mentioned that the ODR Regulation has established a platform called "The ODR Platform",[56] which links all national entities involved in dispute resolution. Through this platform, consumers can, free of charge, use the website, which is available in all the official languages of the European Union. Businesses or traders have to provide an electronic link to the ODR platform on their websites to inform consumers. Consumers can submit complaints by filling in an electronic complaint form available in all the official languages of the institutions of the European Union and attaching any relevant documents, as noted above. The platform will inform the trader of the complaint. The consumer and the trader will then agree on a national institutional body (entity) to resolve their dispute, including mediation bodies such as Postal mediation service at the Regulatory Authority for Broadcasting and Telecommunications in Austria, *Postschlichtungsstelle bei der Rundfunk- und Telekom Regulierungs-GmbH.* and Telecommunications Mediation Service in Belgium, *Le service de médiation pour les télécommunications – Ombudsdienst voor de telecommunicatie*.[57]

The dispute resolution body will receive all details of the dispute *via* the ODR platform and will conduct the proceedings online. For this purpose, the ODR platform provides, free of charge, an electronic case management tool, which enables the institutions to conduct the proceedings within the ODR platform, though without any obligation to use the tool.[58] An entity, which has agreed to deal with a dispute shall conclude the procedure within the deadline referred to in point (e) of Article 8 of Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes,[59] and it shall not require the physical presence of the parties or their representatives, unless its procedural rules provide for that possibility and the parties agree. An entity shall, without delay, transmit

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54 *See* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0011&from=EN (10. 09. 2017).

55 On this Directive, see http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF (10. 09. 2017).

56 On this ODR platform, which is available in most European languages, see https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.show&lng=EN (10. 09. 2017). To choose the platform in another European language, see https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.chooseLanguage (10. 09. 2017).

57 On full list of dispute resolution bodies, see: https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.adr.show (10. 09. 2017).

58 For more practical details on the use of this platform, see: Commission Implementing Regulation (EU) 2015/1051 of 1 July 2015 on the modalities for the exercise of the functions of the online dispute resolution platform, on the modalities of the electronic complaint form and on the modalities of the cooperation between contact points provided for in Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes, EU: Regulation (EU) 2015/1051 Celex No. 315R1051, European Union Legislation, Official Journal L 171, 02/07/2015 European Commission, ELLIS Publications.

59 Art. 8(e) of this Directive reads "*the outcome of the ADR procedure is made available within a period of 90 calendar days from the date on which the ADR entity has received the complete complaint file. In the case of highly complex disputes, the ADR entity in charge may, at its own discretion, extend the 90 calendar days' time period. The parties shall be informed of any extension of that period and of the expected length of time that will be needed for the conclusion of the dispute*", *supra* fn. 54.

the following information to the ODR platform: the date of receipt of the complaint file, the subject-matter of the dispute; the date of conclusion of the procedure; and the result of the procedure.[60]

The ODR platform, which is linked to the European Commission, shall help consumers to solve their e-commerce disputes online. ODR advisers who are linked to the ODR platform will provide consumers in different EU countries with information on their rights and means of redress in relation to online purchases. In addition, they will assist consumers with the submission of complaints and facilitate communications between the party and the competent national institution through the ODR platform. The competent institution is under no obligation to conduct the proceedings through the ODR platform.[61] However, the ODR platform faces some challenges in practice. These challenges may undermine the efficacy of resolution of e-commerce B2C disputes through online mediation.

The success of the applicability of this ODR platform depends on how member states' courts will interpret the provisions of the pertinent regulation when dealing with consumers' e-commerce disputes, as well as on how both consumers and traders will deal with this new ODR platform, noting that participation in dispute resolution via this platform is voluntary for traders, as noted above

Pablo Cortes sums up these challenges, including that it is a little known among consumers, traders do not provide a link or an e-mail as required by the above regulation, the platform is voluntary for traders, and that fifty-five percent of disputes closed after 30 days. According to him, the ODR platform needs additional functions, including database of traders' e-mails, problem diagnosis, making it mandatory for traders to reply, online negotiations, and automatic referrals.[62]

Needless to say, Article 9(8) of this regulation states that where the parties fail to agree within 30 calendar days after submission of the complaint form on an ADR entity, or the ADR entity refuses to deal with the dispute, the complaint shall not be processed further.

Assessment

In the light of the above analysis, it should be mentioned that the ODR Regulation enables both consumers and traders to submit their domestic or cross-border disputes arising out of or relating to their online purchases to any ODR technique, including e-mediation, and that this regulation has established an online dispute resolution platform at the EU level, as stated above. The ODR platform mainly allows consumers who encounter problems when they shop online to submit a complaint through this ODR Platform in the language of their choice.[63] The ODR platform has taken the form of an interactive and multilingual website offering a single point of entry to consumers and traders seeking to resolve out-of-court disputes concerning contractual obligations stemming from online sales and service contracts.[64]

The success of the applicability of this ODR platform depends on how member states' courts will interpret the provisions of the pertinent regulation when dealing with consumers' e-commerce disputes, as well as on how both consumers and traders will deal with this new ODR platform, noting that participation in dispute resolution via this platform is voluntary for traders, as noted above.

The UNCITRAL Technical Notes on Online Dispute Resolution of 2016

Overview

The newest instrument that deals with ODR is the UNCITRAL Technical Notes on Online Dispute Resolution for Cross-Border Electronic Commerce Transactions, (hereinafter "The Technical Notes"), reflecting the elements and the principles of an ODR process that may apply to disputes arising out of B2B or B2C e-commerce transactions. These Technical Notes are deemed an additional welcome instrument in the edifice of ODR, although the ODR community, including this author, has expected that Member States would have reached a Model Law or an international convention regulating both the legal and the technical issues of ODR process, including online mediation. However, one may argue that the Technical

60 *See* the Regulation on Consumer ODR Art. 10, entitled 'Resolution of the dispute'.

61 *See* Regulation on Consumer ODR, Art. 10, *Ibid*.

62 *See* his presentation, entitled: Consumer Dispute Resolution in the EU, in a Conference on 'Equal Access to Information and Justice Online Dispute Resolution-ODR 2017', The ICC International Court of Arbitration, Paris 12-13 June 2017-unpublished yet-.

63 *See* ODR Regulation, Ch. II.

64 *See* Commission Implementing Regulation (EU) 2015/1051 of 1 July 2015 on the modalities for the exercise of the functions of the online dispute resolution platform, on the modalities of the electronic complaint form and on the modalities of the cooperation between contact points provided for in Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes, *supra* fn. 58.

Notes provide technological best practices for ODR platforms.[65] In this, it should be mentioned that the U.S. Mission to the United Nations welcomed the adoption of the Technical Notes on Online Dispute Resolution, confirming that ODR is essential to enhancing access to justice and promoting cross-border commerce. It also confirmed that ODR could be particularly helpful to small businesses that do not have access to cost-effective dispute resolution remedies.[66] The Technical Notes may apply to disputes arising out of both sales and service contracts.[67]

The Technical Notes consist of 12 sections. Section I is an introduction. Section II deals with principles, including transparency, independence, and expertise. Section III deals with stages of an ODR process, including negotiation, a facilitated settlement, and a third (final) stage. Section IV, entitled scope of ODR process, states that an ODR process may be particularly useful for disputes arising out of cross-border and low-value e-commerce transactions. It also states that an ODR process may apply to disputes arising out of both B2B and B2C transactions. Section V includes definitions pertaining to ODR, roles and responsibilities, and communication. Section VI deals with the commencement of ODR proceedings. This section states clearly that in order to commence an ODR proceeding, it is desirable that the claimant provides to the ODR administrator a notice containing, *inter alia*, the name and electronic address of the claimant, the name and electronic address of the respondent, the grounds on which the claim is made, any solutions proposed to resolve the dispute, the claimant's proposed language of proceedings, and the signatures or other means of identification and authentication of the claimant and/or the claimant's representatives. Section VII deals with negotiation. Section VIII deals with facilitated settlement 'mediation' as a second stage of ODR proceedings, if negotiation via the platform fails. Under this Section, in the facilitated settlement stage, it is desirable that the neutral communicates with the parties to try to achieve a settlement. If a facilitated settlement cannot be achieved within a reasonable period of time, the process may move to a final stage. Section IX deals with appointments, power, and functions of the neutral. Section X is devoted to the language used for the proceedings. Section XI deals with Governance, and finally Section X states that if a neutral has not succeeded in facilitating the settlement, it is desirable that the ODR administrator, on the basis of information submitted by the parties, remind the parties of, or set out for the parties, the possible process options of final stage, and ensure that the parties are aware of the legal consequences of the choice of the process.[68]

Legal Issues

It should be observed that the Technical Notes have not dealt with the legal aspects of the ODR process. This means that Member States have only agreed on the technical aspects despite the fact that the legal aspects of the ODR process are of importance in practice. Under these Notes, however, parties may agree *via* a dispute resolution clause to settle their dispute that may arise out of their e-contract, which may specify both the ODR administrator and the ODR platform.[69]

The Technical Notes are non-binding because they do not impose any legal requirement on the parties nor on any persons or entities administering or facilitating an ODR proceeding, and because they do not imply any modification to any ODR rules that the parties may have selected.[70] The purpose of these Notes is to foster the development of ODR as a form of dispute resolution by assisting the participants in an Online Dispute Resolution system in the conduct of ODR proceedings, noting that the procedural practices in ODR proceedings vary widely in ODR systems.[71]

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65 *See* Dennis, M., Commercial Justice in a Digital World – Online Dispute Resolution, Submitted by: United States, Asia-Pacific Economic Cooperation, 2016/SOM1/EC/WKSP1/010 Session 9, available at: http://mddb.apec.org/Documents/2016/EC/WKSP1/16_ec_wksp1_010.pdf (10. 09. 2017).

66 The U.S. Mission to the United Nations has issued news release after the 71st Session of the General Assembly Sixth Committee on Agenda Item 76: Report of the United Nations Commission on International Trade Law on the Work of its Forty-Ninth Session.

67 On these Technical Notes and the Guide to Enactment, see: http://www.uncitral.org/uncitral/en/uncitral_texts/odr/2016Technical_notes.html (10. 09. 2017).

68 On draft outcome document reflecting elements and principles of an ODR Process, see https://documents-dds-ny.un.org/doc/UNDOC/LTD/V15/089/59/PDF/V1508959.pdf?OpenElement (10. 09. 2017).

69 *Ibid.*

70 *See supra* fn. 67.

71 *Ibid.*

Assessment

Through review of the above Technical Notes, it should be observed that they have explicitly referred to both online negotiation and a facilitated settlement, which is a form of mediation, conducted between the parties via the ODR platform. In addition, they have referred to a final stage in case of failing both negotiation and mediation. That is, they do not refer to online arbitration directly. Moreover, these Notes are designed for institutional ODR but not for an *ad hoc* ODR. According to the same Notes, an ODR process cannot be conducted on an *ad hoc* basis without an administrator because an ODR process requires a system for generating, sending, receiving, storing, exchanging or otherwise processing communications. Such a system is referred to as an "ODR platform". Finally, and possibly most importantly, the Notes have not dealt with the enforceability of cross-border e-mediation settlement agreements in national courts.

Many common law and civil law countries have enacted laws that deal with e-commerce, and with e-signatures. These laws are based on the UNCITRAL Model Law on Electronic Commerce of 1996, and on the UNCITRAL Model Law on Electronic Signatures of 2001

Conclusion

The international legal framework "instruments" regulating e-commerce transactions includes, *inter alia*, the UNCITRAL Model Law on Electronic Commerce of 1996, and the UNCITRAL Model Law on Electronic Signatures of 2001. Both instruments are mainly designed for B2B e-commerce transactions.

In addition to the above instruments regulating electronic commerce, there are other resources facilitating electronic commerce, including electronic communications, such as the ICC Incoterms 2010, and the ICC eTerms 2004. Both the ICC Incoterms and the ICC eTerms are widely used in e-contracting between businesses.

The UNCITRAL Model Law on Electronic Commerce of 1996 is deemed the main pillar in the edifice of electronic commerce transactions because it adopts a modern legal regime for facilitating e-commerce transactions. Also, the Model Law on E-Commerce constitutes international legal machinery for using online mediation as part of ODR techniques in e-commerce disputes.

The UNCITRAL Model Law on Electronic Signatures of 2001 provides a legal effect to documents or messages transmitted and signed over the Internet. It also provides e-signatures a legal effect equivalent to handwritten signatures in national legislations. In practice, this Model Law aims to give digital signatures the same evidential value given to handwritten signatures before national courts. Both the Model Law on E-Commerce and the Model Law on E-Signatures include provisions that facilitate electronic contracting. Even so, one may argue that the world has changed and digitalisation has recently entered a new stage that does not find itself reflected in the existing UNCITRAL texts regulating e-commerce and e-communications so far, including both the Model Law on Electronic Commerce, and the Model Law on Electronic Signatures. This new stage of digitalisation may include, *inter alia*, smart contracts, Internet of Things, virtual currencies, and Blockchain technologies. On that basis, there might be a need for the amendment of both model laws in order to meet the above new challenges and developments.

Many common law and civil law countries have enacted laws that deal with e-commerce, and with e-signatures. These laws are based on the UNCITRAL Model Law on Electronic Commerce of 1996, and on the UNCITRAL Model Law on Electronic Signatures of 2001.

The UNCITRAL has recently posted Technical Notes on online dispute resolution for cross-border electronic commerce transactions. These Notes have dealt with online mediation as an ODR technique for resolution of cross-border e-commerce disputes. However, they have not dealt with online arbitration expressly. Rather, they have referred to a third stage in case of failing both online negotiation and online mediation. In addition, they have not dealt with the enforceability of mediation settlement agreements. Apart from that, these Notes are only designed for institutional dispute resolution process conducted online, but not for an *ad hoc* dispute resolution process.

The European Parliament and the Council of Europe have promulgated a new regulation on online dispute resolution for consumer disputes. This regulation No.524/2013 of 21 May 2013 represents the institutionalisation of consumer ODR in the European Union. This regulation has established a wide platform called the "ODR platform", which allows consumers who encounter problems when they shop online to submit a complaint in the language of their choice. Even so, this platform faces some challenges in

practice, which may hinder resolution of B2C e-commerce disputes through online mediation.

Some international dispute resolution centres (providers) conduct the mediation process online. To give an example, the Chamber of Arbitration of Milan, *Camera Arbitrale di Milano*, administers e-mediation under its own *ResolviOnline* Rules of 2015. Under these online rules, the *Camera Arbitrale di Milano* provides some online dispute resolution services, particularly e-mediation, for settling both domestic and international disputes arising out of commercial contracts.

Zahteva za arbitražo in tožba

Boštjan Špec

Boštjan Špec je odvetnik in ustanovitelj Odvetniške družbe Špec o.p. d.o.o. Predmet njegovega dela so gospodarske pravne zadeve, vključno z arbitražo in sodnimi spori, s poudarkom na mednarodnem poslovanju. Je arbiter pred Stalno arbitražo pri Gospodarski zbornici Slovenije. Boštjan je pridobil naziv Master of Laws na pravni šoli Univerze Georgetown v Washingtonu, DC, ZDA. Več o Boštjanu Špecu in njegovem delu lahko poizveste na spletni strani www.bosp.si ali ga kontaktirate na bostjan.spec@bosp.si

Uvod

V praksi se neredko dogaja, da stranke oziroma njihovi pooblaščenci v arbitražnem postopku, verjetno iz previdnosti ali pa zaradi izkušenj v domačem pravdnem postopku pred sodišči, v zahtevi za arbitražo (pa tudi – posledično ali ne – v odgovoru nanju) v bistvu povzamejo vse, kar kasneje zapišejo tudi v tožbi (ali v odgovoru na tožbo)

Menim da je potrebno zahtevo za arbitražo (in odgovor nanjo) upoštevati predvsem kot vlogo na podlagi katere arbitraža presodi ali so na prvi pogled podani osnovni pogoji za arbitražni postopek, vključno s pristojnostjo arbitraže in nato sproži postopek oblikovanja arbitražnega senata, ki bo kasneje vsebinsko odločil o zadevi

Zakon o arbitraži (Uradni list RS, št. 45/08; ZArbit) določa, da se arbitražni postopek začne z zahtevo stranke, naj se spor predloži arbitraži, če se stranki ne sporazumeta drugače. Šele kasneje, ko je arbitražni senat že imenovan, stranka načeloma vloži tudi tožbo.[1] Enak način poteka postopka določajo tudi Arbitražna pravila Stalne Arbitraže pri Gospodarski Zbornici Slovenije z dne 1. 1. 2014 (v nadaljevanju: Ljubljanska arbitražna pravila).[2] Za razliko od pravdnega postopka, kjer ni posebne napovedi tožbe preko sodišča, je prvi stik stranke z arbitražo, kot institucijo, zahteva za arbitražo, na katero lahko odgovori tudi nasprotna stranka.[3]

V praksi se neredko dogaja, da stranke oziroma njihovi pooblaščenci v arbitražnem postopku, verjetno iz previdnosti ali pa zaradi izkušenj v domačem pravdnem postopku pred sodišči, v zahtevi za arbitražo (pa tudi – posledično ali ne – v odgovoru nanju) v bistvu povzamejo vse, kar kasneje zapišejo tudi v tožbi (ali v odgovoru na tožbo). Kasneje, ko je arbitražni senat[4] že imenovan in arbiter ali arbitražni senat pozove stranke na vložitev tožbe, tožnik tako ponovno navede, kar je zapisal v zahtevi za arbitražo, čemur seveda, glede na odgovor na zahtevo za arbitražo, ne ostane dolžna tožena stranka v odgovoru na tožbo. Neredko tako pride do podvajanja vlog – arbitražni senat dobi v spis dva para zelo podobnih in obsežnih vlog strank, ki jih je potrebno za nameček še primerjati. Jasno je, da tako ravnanje strank podaljšuje arbitražni postopek in otežuje delo arbitraži, skratka nasprotuje samemu namenu arbitražnega postopka.

Kot želim prikazati v prispevku, menim da je potrebno zahtevo za arbitražo (in odgovor nanjo) upoštevati predvsem kot vlogo na podlagi katere arbitraža presodi ali so na prvi pogled podani osnovni pogoji za arbitražni postopek, vključno s pristojnostjo arbitraže in nato sproži postopek oblikovanja arbitražnega senata, ki bo kasneje vsebinsko odločil o zadevi. Sam menim, da vsebine zahteve za arbitražo, kolikor to ne zahteva presoja arbitražnega sporazuma, ni potrebno obremenjevati z

1 Glej člena 25 in 27 ZArbit.

2 Glej člena 4 in 27 Ljubljanskih arbitražnih pravil. Ureditev po ZArbit in Ljubljanskih arbitražnih pravilih je skladna z Vzorčnim zakonom o mednarodni trgovinski arbitraži UNCITRAL 1985 (s spremembami sprejetimi 2006), dosegljivim na http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html, stran obiskana 2. 6. 2017 (glej člene 21 in 23). Enako tudi po členih 3 in 20 Arbitražnih pravilih UNICITRAL spremenjene 2010 (z novim členom 1, odstavek 4, kot sprejet leta 2013), dosegljivih na http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html (stran obiskana 2. 6. 2017).

3 Glej tudi Djinović, M., in Lahne, N.: Z novimi pravili do sodobne arbitraže (1), Pravna praksa, 2014, št. 16-17, str. 9, kjer avtorja med ostalim natančno obrazložita vse sestavine zahteve za arbitražo.

4 Pojem »arbitražni senat« uporabljam v nadaljevanju tudi za primere arbitražnega postopka v katerem odloča arbiter posameznik.

dejansko podlago do mere, ki bo sicer podana v tožbi. Niti zakon niti Ljubljanska arbitražna pravila ne preprečujejo, da stranka ne bi začela arbitraže z zahtevo, ki bi v celoti ustrezala tudi pogojem za tožbo, a menim, da tak pristop za stranko praviloma ni optimalen, če pa ga stranka uporabi, naj vsaj ne privede do podvajanja vlog strank.

Vsebina zahteve za arbitražo in tožbe v arbitražnem postopku glede na ZArbit in Ljubljanska arbitražna pravila

Glede vsebine zahteve za arbitražo ZArbit ne določa drugega kot zahtevo, da se spor predloži arbitraži.[5] Arbitražna pravila so bolj natančna in v 5. členu določajo vsebino zahteve za arbitražo. Poleg podatkov o stranki in pooblaščencih in procesnih vprašanj, ki se tičejo samega arbitražnega postopka (sporazum, predlog števila arbitrov, jezika in sedeža arbitraže, vplačilo takse) mora vsebina zahteve za arbitražo obsegati tudi opis spora in okoliščin, iz katerih izvira zahtevek, zahtevek in oceno vrednosti zahtevka, če se ta ne nanaša na denarni zahtevek.

Če primerjamo zahtevo za arbitražo s tožbo, ZArbit glede tožbe v 27. členu določa, da mora tožba vsebovati določen zahtevek in navedbo dejstev, na katere stranka opira svoj zahtevek ter med strankami sporna vprašanja. Stranka lahko predloži listine, ki jih šteje za pomembne, ali se sklicuje na dokaze, ki jih namerava še predložiti. 26. člen Ljubljanskih arbitražnih pravil podobno določa, da mora tožba vsebovati, kolikor tega ne vsebuje že zahteva za arbitražo, zahtevek ter dejstva in razloge, na katere tožeča stranka opira zahtevek. Arbitražni senat tako mora, ko presoja o sporu (tako nedvomno izhaja tudi iz 26. in 27. člena Ljubljanskih arbitražnih pravil), upoštevati tako zahtevo za arbitražo, tožbo in morebitne kasnejše vloge strank (ki jih senat dopusti) ter odgovore nanje.

Ker morata tako zahteva za arbitražo kot tudi tožba po Arbitražnih pravilih vsebovati tudi vsebinske navedbe glede zahtevka (primerjaj 5. in 26. člen Ljubljanskih arbitražnih pravil), ima stranka arbitražnega postopka pravico, da se v tožbi glede dejstev in razlogov, na katere opira svoj zahtevek, kolikor so navedeni v zahtevi za arbitražo, enostavno sklicuje na zahtevo za arbitražo. Menim, da taka rešitev za stranko, ki se na prvi pogled sicer zdi enostavna, ne bo nujno optimalna. Najprej, »opis spora in okoliščin, iz katerih izvira zahtevek«, ki ga mora vsebovati zahteva za arbitražo po 5. členu, ne ustreza pogoju glede »dejstev in razlogov, na katere tožeča stranka opira zahtevek«, ki jih mora vsebovati tožba po 26. členu Arbitražnih pravil. Nedvomno se obe vsebini vsaj delno prekrivata, pri čemer pogoj glede »dejstev in razlogov, na katere tožeča stranka opira zahtevek« iz tožbe dosega in presega tudi pogoj »opisa spora in okoliščin, iz katerih izvira zahtevek« v zahtevi za arbitražo (a to ne velja tudi obratno). Pogoj iz zahteve za arbitražo je nedvomno bolj splošen, saj stranka v zahtevi ne rabi navesti dejstev na katere opira svoj zahtevek.[6] Za razliko od tožbe v pravdnem postopku, pa tudi zahteve za arbitražo v arbitražnem postopku, mora tožba v arbitražnem postopku na podlagi Ljubljanskih arbitražnih pravil vsebovati tudi razloge, na katere stranka opira svoj zahtevek. Zdi se, da poleg dejanske podlage zahtevka[7], pogoj glede razlogov, na katere stranka opira svoj zahtevek, nakazuje na obveznost pravne obrazložitve zahtevka.[8] Če bi se tožeča stranka želela v tožbi sklicevati le na navedbe v zahtevi za arbitražo, bi morala zadostiti pogoju za tožbo in tako že v zahtevi za arbitražo navesti »dejstva in razloge, na katere tožeča stranka opira zahtevek«. Res je, da se lahko stranka v tožbi sklicuje le delno na predhodne navedbe v zahtevi za arbitražo, preostale navedbe pa neposredno doda v tožbi. A zgolj delno sklicevanje v tožbi na navedbe v zahtevi, ob dodatnih navedbah v tožbi, bo povzročilo še večjo nepreglednost in razbitost navedb po različnih vlogah kot sicer. Prav tako pa bo povzročilo, da bo tožeča stranka po nepotrebnem svoje argumente v tožbi (delno) razkrila nasprotni stranki že na samem začetku arbitražnega postopka, še preden bo imenovan arbitražni senat.[9]

Pri tem je potrebno opozoriti, da mora stranka tožbi v skladu s tretjim odstavkom 26. člena Ljubljanskih arbitražnih pravil predložiti dokumente in druge dokaze, na katere se tožeča stranka sklicuje. Poziv stranki za

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5 Člen 25 ZArbit.

6 Ta pogoj za tožbo v Arbitražnih pravilih vsaj glede dejstev ustreza pogoju za tožbo iz 180. člena ZPP.

7 Primerjaj Ude, L., Galič, A. (urednika), Pravdni postopek s komentarjem, 2. knjiga, Uradni list RS in GV Založba, Ljubljana, 2006, stran 129.

8 Glej tudi prevod Arbitražnih pravil v angleščino, ki se v točki ii. drugega odstavka 26. člena glasi na »*legal grounds supporting the claim*« torej pravne razloge, ki utemeljujejo zahtevek.

9 Glej Born, B. G.: International Commercial Arbitration, Commentary and Materials, Transnational Publishers, Kluwer Law International, druga izdaja, 2001, stran 452, opomba 70.

vložitev tožbe bo izdal že oblikovani arbitražni senat, medtem ko bo zahtevo za arbitražo na lastno pobudo vložila stranka, ki bo želela začeti arbitražni postopek na podlagi Arbitražnih pravil. Pred izdajo poziva na tožbo pa bo arbitražni senat običajno[10] opravil pripravljani sestanek strank, na katerem bo, po posvetovanju s strankami, neredko določil prekluzivna pravila glede dokazov. Poziv strankam na vložitev tožbe bo v takem primeru neredko vseboval tudi poziv strankam, da glede na sprejeta procesna pravila za arbitražni postopek, tožbi priložijo tudi vse dokaze, na katere se stranki sklicujeta glede tožbenih (oziroma odgovornih) trditev, kar pomeni, da bo stranka verjetno morala dokaze predložiti že s tožbo. Predlaganje dokazov pred samo tožbo v zahtevi za arbitražo bo sicer dopustno, a bo po nepotrebnem nasprotni stranki dalo dodatni čas za presojo dokazov. Težko pa si je zamisliti vlogo, po kateri bi tožeča stranka dokaze predlagala in predložila v tožbi, a se pri tem sklicevala na navedbe iz zahteve za arbitražo.

Zahteva za arbitražo je namenjena uvodni presoji pristojnosti arbitraže in oblikovanju arbitražnega senata

Namen zahteve za arbitražo je predvsem v tem, da arbitraža (ne arbitražni senat) na prvi pogled (*prima facie*) lahko presodi ali obstaja pristojnost arbitraže za odločanje po Ljubljanskih arbitražnih pravilih. Če bi stranke sledile takemu pristopu, do težav s podvajanjem, nepreglednostjo, ter razbitostjo navedb postopka, med zahtevo za arbitražo in tožbo, ne bi prišlo

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Zgoraj navedeno lahko utemeljimo s pregledom pravil, ki so vezana na zahtevo za arbitražo po Ljubljanskih arbitražnih pravilih. Poleg osnovnih podatkov mora zahteva za arbitražo vsebovati tudi navedbe in dokaze glede arbitražnega sporazuma ter osnovne predloge glede arbitražnega postopka (jezik, sedež, število in predlog glede arbitrov). Del zahteve za arbitražo, ki se nanaša na opis spora in okoliščin, iz katerih izvira zahtevek ter sam zahtevek, se tako kaže predvsem kot opis relevantnega dejanskega stanja, na podlagi katerega lahko predsedstvo (Stalne arbitraže pri GZS) presodi, ali je očitno podan kakršenkoli razlog za odklonitev obravnavanja. To na primer jasno izhaja iz 10. člena Ljubljanskih arbitražnih pravil, ki omogoča predsedstvu Stalne Arbitraže pri GZS, da odkloni obravnavanje, če očitno ni podana pristojnost za odločanje po Ljubljanskih arbitražnih pravilih ali bi bila izvedba postopka nesorazmerno otežena. Predsedstvo bo tako odločitev sprejelo na osnovi predloženega arbitražnega sporazuma in glede na zahtevek ter opis spora in okoliščin, iz katerih izvira zahtevek, kot izhaja iz zahteve za arbitražo oziroma odgovora na zahtevo. Če predsedstvo ne bo videlo ovir za obravnavanje zadeve, bo v skladu z navedbami zahteve za arbitražo in odgovora na zahtevo sekretariat Stalne arbitraže nadaljeval z aktivnostmi za oblikovanje arbitražnega senata (členi 13. in naprej Ljubljanskih arbitražnih pravil) in zadevo po plačilu predujma za kritje stroškov arbitraže predal v reševanje arbitražnemu senatu (20. člen Ljubljanskih arbitražnih pravil).[11]

Tožnik v zahtevi za arbitražo tako ne rabi predlagati dokazov ali celo navajati pravnih razlogov za utemeljenost svojega zahtevka. Dejanska podlaga v zahtevi za arbitražo mora, poleg osnovnih podatkov in postopkovnih vprašanj, izkazovati zgolj obstoj arbitražnega sporazuma glede zatrjevanega spora in opisa okoliščin, iz katerih izvira zahtevek. Stranke sicer imajo pravico, da se glede tega odločijo drugače, vendar sam menim, da tak način najbolje odraža namen zahteve za arbitražo in ustreza načelu ekonomičnosti in hitrosti arbitraže.

10 Kar sledi tudi iz objavljenih Smernic za arbitre, junij 2015 na spletnih straneh Stalne arbitraže, dosegljivo na http://www.sloarbitration.eu/Portals/0/Smernice-za-arbitre/Smernice%20za%20arbitre%20Stalne%20arbitra%C5%BEe%20pri%20GZS%202015.pdf; stran obiskana 2. 6. 2017.

11 Tak namen zahteve za arbitražo lahko na primer razberemo tudi v Arbitražnih pravilih UNCITRAL (glej opombo 2), ki v 3. členu glede obvestila za začetek arbitražnega postopka (*notice of arbitration*) med ostalim zahteva le navedbo pogodbe ali drugega pravnega akta, oziroma, če tega ni, opis pravnega razmerja iz katerega izhaja spor, kratek opis zahtevka ter pravnega varstva, ki ga tožnik zahteva. Na drugi strani Vzorčni zakon o mednarodni trgovinski arbitraži UNCITRAL 1985, glej opombo 2) glede vsebine zahteve za začetek arbitražnega postopka (člen 21) navaja samo zahtevo, da se določen spor predloži v reševanju arbitraži. Za razliko od UNCITRAL-ovih pravil, se po Pravilih arbitraže ICC (veljavnih od 1. marca 2017, dosegljiva na https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/, stran obiskana 2. 6. 2017) vsebina zahteve za arbitražo (*request for arbitration*) približuje vsebini tožbe, a hkrati pravila ne vsebujejo primerljivih določil o tožbi in njeni vsebini, kot to izhaja iz Ljubljanskih arbitražnih pravil, ZArbit in pravil UNCITRAL. Vprašanje vsebine dodatnih vlog oziroma tožbe se zdi po pravilih ICC prepuščeno predvsem strankam in arbitrom, ko določajo pravila postopka.

Consequences of the Breach of Arbitration Agreements

Dr. Simon Gabriel, LL.M, Dr. Nataša Hadžimanović

Attorney at law, founder and partner of the Swiss arbitration boutique GABRIEL Arbitration. Simon studied law at the Universities of Berne (CH) and British Columbia, Vancouver (CDN). He holds a doctoral degree from the University of Lucerne (CH) and an LL.M. in advocacy from the University of Strathclyde (UK). He is admitted to the bar in Switzerland. Simon has been involved in more than 60 arbitration proceedings as party representative and arbitrator. Most of the arbitration proceedings have been about international sales of goods, post-M&A disputes, and disputes concerning joint ventures and consortia. The University of Lucerne has recently appointed Simon as lecturer for international arbitration. Web: www.gabriel-arbitration.ch

Attorney at law, senior associate of the Swiss arbitration boutique GABRIEL Arbitration. Nataša studied law at and holds a doctoral degree from the University of Zurich (CH). She is admitted to the bar in Switzerland. Nataša has acted as party representative in international arbitration proceedings. Her recent cases have been on international sales of goods and international construction projects in the steel industry. Her practice focuses on South East Europe. The University of Zurich has recently appointed Nataša as lecturer for comparative law.

Focus of the Present Contribution

What is the consequence if a party in international arbitration proceedings breaches the arbitration agreement? This question regularly arises in international arbitration practice and clear answers are rare in legal literature.

Upon kind invitation of the Slovenian Arbitration Review, the present contribution analyzes this question mainly from a Swiss legal perspective and proposes answers that may also be suitable for other civil law jurisdictions. It is based on an already existing article that was first published in Switzerland in 2013 and further develops the analysis of the most practically relevant situations.[1]

In this respect, the authors identified three scenarios in which compensation claims for breaches of arbitration agreements typically arise:

(i.) Damages in view of a party's initiating of state court proceedings despite having agreed to arbitration;
(ii.) Immediate compensation in view of a party's non-payment of the advance on costs;
(iii.) Damages in view of the disclosure of confidential information.

General Prerequisites for an Award for Compensation in Arbitration

Three Prerequisites

For an arbitral tribunal to be competent to award compensation for the breach of an arbitration agreement, the tribunal needs to have: (i) jurisdiction over such a dispute in general, (ii) a substantive compensation claim must exist, and (iii) the substantive claim must be brought within the ambit of the specific arbitration proceedings.

Jurisdiction

In contrast to state courts, arbitral tribunals are not competent by law to hear a dispute. They must be empowered to do so by the parties by way of an arbitration agreement conferring jurisdiction upon the tribunal.[2] For the present purposes, the authors assume an arbitration agreement with regard to the dispute on the merits. Typically, such an arbitration agreement would be found in the final provisions of a substantive contract (*e.g.* a sales contract or a joint venture contract).

At the same time, for an arbitral tribunal to be competent to award compensation for potential breaches

For an arbitral tribunal to be competent to award compensation for the breach of an arbitration agreement, the tribunal needs to have: (i) jurisdiction over such a dispute in general, (ii) a substantive compensation claim must exist, and (iii) the substantive claim must be brought within the ambit of the specific arbitration proceedings

1 Gabriel, S.: Damages for Breach of Arbitration Agreements, in: Arroyo, M. (ed.), Arbitration in Switzerland, The Practitioner's Guide, Kluwer, Alphen aan den Rijn, 2013, pp. 1473 et seqq.

2 Born, G.: International Commercial Arbitration, Part I International Arbitration Agreements, second edition, Kluwer, Alphen aan den Rijn, 2014, p. 225; Berger, B./Kellerhals, F.: International and Domestic Arbitration in Switzerland, third edition, Stämpfli, Bern, 2015, para. 687 on the requirements for jurisdiction.

of the arbitration agreement itself, the tribunal must further ascertain whether the parties agreed to arbitrate also these specific compensation claims. In other words: Does the arbitration agreement provide for arbitral jurisdiction on substantive disputes about the arbitration agreement?

This question cannot presently be answered for all possible legal orders that may govern an arbitration agreement. Furthermore, the answer depends on the specific phrasing of the relevant arbitration agreement.

For arbitration agreements that are governed by Swiss *lex arbitri*[3] or comparable *leges arbitri* it is submitted that the arbitration agreement typically provides for arbitral jurisdiction for substantive disputes arising out of the arbitration agreement, unless this is expressly excluded by the agreement itself.[4]

Theoretically, it could be argued that the arbitration agreement does not refer to itself to the extent that it is a separate contract under some *leges arbitri* (such as in Switzerland).[5] However, such an understanding appears to be too dogmatic and even artificial. It would mean that parties who intend to agree that one competent arbitral tribunal should decide on any disputes arising out of their substantive contract would need to include a second arbitration agreement into their contract specifying jurisdiction the first arbitration agreement. This can obviously not be expected from parties who are principally interested in a commercial arrangement and not in legal peculiarities of international arbitration.

In the context of compensation claims for potential breaches of an arbitration agreement, both statutory and contractual bases may potentially be invoked (subject to the tribunal's jurisdiction)

On the other hand, the concept that one competent arbitral tribunal should decide on any disputes arising out of the substantive contract (including the arbitration agreement) appears as reasonable: (i) It is more economic to have one competent judicial instance, instead of two. (ii) The same reasons for which the parties chose international arbitration (*e.g.* enforceability, language, choice of arbitrators, etc.) will most probably also apply to substantive disputes arising out of the arbitration agreement. (iii) If two different judicial instances deal with one arbitration agreement (one from a procedural and the other one from a substantive perspective) there is a considerable risk of conflicting interpretations and thus conflicting judgments, which is certainly not in the interest of any reasonably thinking party.

For these reasons, arbitral jurisdiction exists for substantive disputes on arbitration agreements with the typical language (such as: all disputes »arising out of the contract« or »in connection with the contract«).[6]

Legal Basis for Claims

Yet the tribunal having jurisdiction is only the first step in ascertaining whether it may award compensation for the breach of an arbitration agreement. There also needs to be a substantive legal basis for such a compensation claim.

Where a person is entitled to ask from another person to do something or to refrain from doing something, he or she has a claim, which is substantive in legal nature. The legal basis for such claim can be statutory or contractual. In the case of a contract, the parties create the legal basis themselves (in conjunction with the law that ensures that their agreement has, in principle, a binding effect and can be enforced). A contract may give rise to substantive claims for both parties against each other or only for one of them.[7]

In the context of compensation claims for potential breaches of an arbitration agreement, both statutory and contractual bases may potentially be invoked (subject to the tribunal's jurisdiction). A *contractual* claim for compensation thereby depends on the parties creating a corresponding substantive basis in their agreement.

It is important to note, however, that not all contractual provisions create a basis for substantive claims, in particular not in the context of arbitration agreements that are, primarily, concluded to regulate an issue of

3 To international arbitration, Chapter 12 of the Swiss Private International Law Act ("PILS") applies and to domestic arbitration, the Third Part of the Swiss Procedural Act applies.

4 In 2013, the Swiss Federal Tribunal specifically held that, under Swiss *lex arbitri*, arbitral tribunals have jurisdiction to decide on claims for damages for breach of an arbitration agreement: Decision of the Swiss Federal Tribunal, BGer. 30.9.2013, 4A_232/2013 para. 3.4.2.

5 Berger, B./Kellerhals, F., op. cit. (fn. 2), paras. 679 et seqq. on the autonomy of arbitration agreements.

6 See for instance the standard clause of the Ljubljana Arbitration Centre: "Any dispute, controversy or claim arising out of or in connection with this contract including the breach, termination or validity thereof, shall be finally settled by arbitration in accordance with the Arbitration Rules of the Ljubljana Arbitration Centre at the Chamber of Commerce and Industry of Slovenia."

7 From a Swiss law perspective: Bucher, E.: Schweizerisches Obligationenrecht, Allgemeiner Teil, Schulthess, Zürich, 1979, pp. 36 et seq.

procedure, namely the tribunal's jurisdiction to decide the parties' dispute on the merits. Furthermore, the parties frequently include provisions that simply regulate the (arbitral) procedure itself. These procedural rules bind the parties as well as any other contractual provision, but they do not create substantive claims. If a party fails to comply with procedural provisions, it will suffer consequences only according to the procedural rules (if at all), such as procedural disadvantages.[8] A typical procedural disadvantage is the default consequence, if a legal brief should be submitted after expiry of a time limit. The Swiss approach to this question, will be explained in more detail herein below.[9]

As this article deals with substantive compensation claims (damages or reimbursement) in the context of potential breaches of arbitration agreements, the authors leave aside such procedural consequences and focus instead on whether the respective provisions in arbitration agreements give rise to substantive (compensation) claims.[10]

Timely Submission of Claims

Finally, substantive claims that are in general covered by the arbitration agreement, *i.e.* a tribunal has in principle jurisdiction to decide them, also need to be brought within the ambit of the specific arbitration proceedings launched in order for the arbitral tribunal to have the opportunity to decide on them in that particular case.[11]

When compensation by way of reimbursement or damages is sought, the arbitral tribunal decides on the merits of a case by way of a (partial or final) award (with *res judicata* effect).

In order to empower the tribunal to decide on the compensation claim in the particular case, the party seeking compensation needs to include its claim in its prayers for relief. This is straightforward for claims that have arisen before the proceedings were initiated.

However, potential breaches of the arbitration agreement, and compensation claims relating to them, may arise also once the proceedings have already been commenced. It then needs to be ascertained whether the prayers for relief may still be amended to include the (new) compensation claims. This will depend on the progress of the arbitration proceedings. If, according to the applicable procedural rules, it is no longer possible to amend the prayers for relief, a party may be forced to start separate arbitration proceedings to obtain substantive relief.

Legal Basis for Substantive Compensation Claims in Arbitration Agreements

The question to what extent an arbitration agreement may serve as a basis for substantive claims depends on its legal nature. In the following, the Swiss approach will be briefly summarized as it reflects a legal development of more than hundred years which may be helpful to understand the importance of the legal nature of arbitration agreements.

The Swiss Federal Tribunal[12] held in 1914 that arbitration agreements are of a purely substantive nature.[13] They should be treated like a substantive contract giving rise to contractual claims. Under this first theory, arbitration agreements would always serve as a basis for substantive compensation claims in case of breach, but this theory nowadays has but little support.[14]

Legal scholars, on the other hand, considered that the legal nature of arbitration agreements and the obligations arising out of these agreements to be purely procedural.[15] This was finally also confirmed by the Swiss Federal Tribunal in 1975.[16]

Currently, the trend is gradually changing towards the view that arbitration agreements may contain substantive as well as purely procedural provisions.

It is important to note, however, that not all contractual provisions create a basis for substantive claims, in particular not in the context of arbitration agreements that are, primarily, concluded to regulate an issue of procedure, namely the tribunal's jurisdiction to decide the parties' dispute on the merits

8 Gabriel, S., op. cit (fn. 1), para. 25.

9 See below.

10 See below.

11 See *e.g.* Art. 23.4 ICC Rules.

12 The highest judicial authority in Switzerland (in German "Bundesgericht").

13 Decision of the Swiss Federal Tribunal, BGer. 17.1.1914, BGE 40 II 77 para. 2, with reference made to the decision of the Swiss Federal Tribunal, BGer. 1.2.1913, BGE 39 II 50 para. 2.

14 Berger, B./Kellerhals, F., op. cit. (fn. 3), para. 687 on the requirements for jurisdiction.

15 Berger, B./Kellerhals, F., op. cit. (fn. 3), para. 309.

16 Decisions of the Swiss Federal Tribunal, BGer. 15.3.1990, BGE 116 Ia 56 para. 3 and BGer. 17.3.1975, BGE 101 II 168 para. 1, with reference to the pertinent precedents.

Procedural agreements **refer to the relationship of the contracting parties vis-à-vis superior bodies of state power and in particular vis-à-vis courts and arbitral tribunals. Hence, procedural agreements do not constitute obligations for the parties and do not require any subsequent performance by the parties**

Substantive agreements **refer to the relationship between the parties of said agreements, constitute (typically mutual) obligations among the parties and require subsequent performance**

Arbitration agreements are now said to be (potentially) of a »combined« or »hybrid« nature.[17]

Two recent decisions of the Swiss Federal Tribunal confirm that if an arbitral tribunal finds that the arbitration agreement contains a combination of procedural and substantive rights and obligations, the award will not be set aside by the Swiss Federal Tribunal for that reason.[18] Arbitral tribunals are thus free to apply the theory of the combined legal nature of arbitration agreements and it may well be that the Swiss Federal Tribunal will finally also follow this latest development in its future jurisprudence.

Assuming that the combined legal nature of arbitration agreements applies (*i.e.* procedural and substantive), the question arises on how the individual agreements can be distinguished.

Parties are in principle free to determine which rights and obligations they agree on, and whether they are meant to be procedural and/or substantive in nature.[19] However, such express agreements are rarely found in practice and do thus not help to make the said distinction.

Rather, the chapter of a contract that is headed »arbitration agreement« or »dispute resolution« is often composed of various different agreements in connection with potential arbitration proceedings: (i) exclusion of state court jurisdiction in favour of arbitration for specified disputes, (ii) seat of arbitration, (iii) language of arbitration, (iv) number of arbitrators, (v) concept of the arbitrator nomination, (vi) reference to arbitration rules of an institution (such as *e.g.* the Ljubljana Arbitration Centre), etc. are just some examples for illustration purposes. To distinguish between procedural agreements on the one hand and substantive agreements on the other hand the following test is suggested:[20]

(i.) *Procedural agreements* refer to the relationship of the contracting parties vis-à-vis superior bodies of state power and in particular vis-à-vis courts and arbitral tribunals[21].[22] Hence, procedural agreements do not constitute obligations for the parties and do not require any subsequent performance by the parties.[23] Rather, procedural agreements instantly *form* the future access to courts, which is implemented by the courts themselves and not by the parties.[24]

(ii.) *Substantive agreements* refer to the relationship between the parties of said agreements, constitute (typically mutual) obligations among the parties and require subsequent performance by the parties themselves.[25]

By application of this test, any particular agreement can be qualified as procedural or substantive in nature. Any substantive agreements in connection with potential arbitration proceedings are to be qualified as substantive legal grounds giving potentially rise to auxiliary duties (in German »*Nebenpflichten*«) in contrast to the principal procedural consequence of the formation of jurisdiction.[26] While such auxiliary duties may not always be enforced *in natura*, their infringement may in any event cause claims for damages.[27]

17 Gabriel, S., op. cit. (fn. 1), para. 12.

18 Decision of the Swiss Federal Tribunal, BGer. 11.2.2010, 4A_444/2009 para. B.c (the fifth sentence, 16.3, with its reference to Art. 97 of the Swiss Code of Obligations ("SCO") indicates that the arbitral tribunal applied Swiss substantive law and thus assumed a combined nature of the arbitration agreement). Decision of the Swiss Federal Tribunal, BGer. 30.9.2013, 4A_232/2013, paras. 3.4.1 (English substantive law was applied) and 3.4.2 (it was held that arbitral tribunals have jurisdiction to award damages for breach of an arbitration agreement).

19 See Stacher, M.: Die Rechtsnatur der Schiedsvereinbarung, Dike, Zürich/St. Gallen, 2007, para. 58.

20 For a summary of different ways of classification, see Berti, St. V.: Zum Verhältnis zwischen materiellem Recht und Prozessrecht, in: Berti, St. V. *et al.* (eds.): Beiträge zu Grenzfragen des Prozessrechts, Schulthess, Zürich, 1991, (pp. 10 et seqq.), pp. 10-12; Girsberger, D./Gabriel, S.: Die Rechtsnatur der Schiedsvereinbarung, in: Gauch, P. *et al.* (eds.): Mélanges en l'honneur de Pierre Tercier, Schulthess, Genève, 2008, (pp. 819 et seqq.), pp. 831-832; Stacher, M., op. cit. (fn. 19), paras. 74-86, with a slightly different terminology and a similar result.

21 Including arbitral tribunals having its seat in Switzerland, which are empowered by law to exercise administration of justice.

22 The relevant relationship may be described as vertical, *i.e.*, between citizens and state bodies.

23 See Art. 7 PILS.

24 See Girsberger, D./Gabriel, S., op. cit. (fn. 20), p. 832, para. 2(ii); Stacher, M., op. cit. (fn. 19), para. 75; Wagner, W.: Die Bindung des Schiedsgerichts an Entscheidungen andere Gerichte und Schiedsgerichte, in: Böckstiegel, K.-H. *et al.* (eds.): Die Beteiligung Dritter an Schiedsverfahren, Schriftenreihe des Deutschen Instituts für Schiedsgerichtsbarkeit, vol. 16, Heymann, Köln/Berlin/München, 2005, (pp. 7 et seqq.), pp. 46-47; Gränicher, D., para. 4 at Art. 178 PILS, in: Honsell, H. *et al.* (eds.): Basler Kommentar, Internationales Privatrecht, third edition, Helbing Lichtenhahn, Basel, 2013.

25 The relevant relationship may be described as horizontal, *i.e.*, between two equal citizens; see Gränicher, op. cit. (fn. 24) para. 4 at Art. 178 PILS.

26 See Berger. B./Kellerhals, F., op. cit. (fn. 3) para.311, with further reference.

27 See Manner, S./Mosimann, O. L.: Damages and Fixed Sums for Breach of Arbitration Agreements, in: Büchler, A./Müller-Chen, M. (eds.): Private Law, national – global – comparative (FS Schwenzer), vol. II, Stämpfli, Bern, 2011, (pp. 1197 et seqq.), p. 1201, with a similar conclusion; Wiegand, W., para. 32 at Art. 97 SCO, in: Honsell, H. *et al.*

The next question is what law governs the substantive parts of the arbitration agreement?

Determination of the Substantive Law Applicable to Arbitration Agreements

As already briefly mentioned above, in order to interpret the arbitration agreement and to determine the procedural rights and obligations contained therein, the applicable law needs to be determined as well.

The arbitration agreement constitutes a separate and distinct agreement from the main contract, and the law applicable to the arbitration agreement must in principle also be determined independently from the law applicable to the main contract.

The procedural parts of the arbitration agreement are governed by procedural rules, *i.e.* the *lex arbitri* applicable at the seat of the arbitration[28]. As far as the *lex arbitri* and the chosen arbitration rules do not contain any specific provisions on the substantive law applicable to the substantive parts of the arbitration agreement, the question arises whether the choice of law in the main contract should be applied.

If the parties have not chosen separately the substantive law applicable to the arbitration agreement, the substantive law governing the main contract also governs the substantive parts of the arbitration agreement (Art. 187 para. 1 Swiss Private International Law Act, »PILS«).[29]

This result also appears as reasonable from a practical point of view: In practice, it is not always clear which provisions form part of the »arbitration agreement« and which do not. Sometimes, the heading »*jurisdiction and applicable law*« or »*arbitration*« does give indications on the provisions which the parties considered to be their »arbitration agreement«. However, sometimes there are just no such indications at all and different provisions are compiled under the heading »*miscellaneous*«.

If there is for example a provision stating, »*The Parties agree that they shall disclose all documents in relation with the Contract before arbitral proceedings start*«, it is almost impossible to determine whether this provision forms (i) part of the arbitration agreement (substantive in nature) or rather (ii) part of the substantive contract. It is also difficult to accept that depending on the classification of this provision a different substantive law should be applied thereon. In order to avoid such artificial distinctions, it appears as reasonable to apply the same substantive law to all substantive provisions of a contract, unless the parties have expressly agreed otherwise.

If there is for example a provision stating, »*The Parties agree that they shall disclose all documents in relation with the Contract before arbitral proceedings start*«, it is almost impossible to determine whether this provision forms (i) part of the arbitration agreement (substantive in nature) or rather (ii) part of the substantive contract

Interim Conclusion

Compensatory consequences for breach of arbitration agreements are available in arbitration proceedings if:

(i.) the arbitral tribunal has jurisdiction over the substantive parts of the arbitration agreement;
(ii.) such substantive parts of an arbitration agreement were indeed affected; and
(iii.) the claim was timely introduced in the arbitral proceedings by submitting a respective prayer for relief.

Moreover, it is submitted that the substantive parts of the arbitration agreement can be defined by saying that they require subsequent performance by a party (and will not be applied by the arbitral tribunal without any further activity of the parties).

Finally, it appears as most reasonable that the substantive law that governs the main contract shall also govern the substantive parts of the arbitration agreement, unless the parties agreed on a different approach.

Appears as most reasonable that the substantive law that governs the main contract shall also govern the substantive parts of the arbitration agreement, unless the parties agreed on a different approach

Damages in Practically Relevant Scenarios

Introductory Remark

In the following three practically relevant situations will be further analyzed:

(i.) Damages for a party's initiating of state court proceedings despite having agreed to arbitration;
(ii.) Immediate compensation in view of a party's non-payment of the advance on costs;

(eds.): Basler Kommentar, Obligationenrecht I, Art. 1-529 OR, fourth edition, Helbing Lichtenhahn, Basel, 2007 with further reference.

28 Poudret, J.-F./Besson, S.: Comparative Law of International Arbitration, second edition, Sweet & Maxwell, London, 2007, para. 115.

29 Friedland, P. D./Brown, K.: A claim for Monetary Relief for Breach of Agreement to Arbitrate as a Supplement or Substitute to an Anti-Suit Injunction, in: van den Berg, A. J. (ed.): International Arbitration 2006: Back to Basics? ICCA Congress Series 2006 Montreal Vol. 13, Kluwer, Alphen aan den Rijn, 2007, pp. 267-281, identify four options: 1. law chosen by the parties to govern the arbitration agreement, 2. the law of the seat of the arbitration, 3. "general principles of arbitration law", and 4. the *lex contractus*, p. 270; Stacher, M., op. cit. (fn. 19), para. 160 holds that the *lex arbitri* is applicable.

(iii.) Damages in view of the disclosure of confidential information.

Damages for the Initiation of State Court Proceedings in Spite of an Arbitration Agreement

Typical Scenario

The claimant starts state court proceedings *e.g.* in the United States, in spite of the existence of an arbitration agreement which provides *e.g.* for arbitration in Zurich, Switzerland. The defendant in these US court proceedings objects to the court's jurisdiction raising the arbitration exception. The US court (correctly) declines jurisdiction. However, the US rule on the allocation of costs applies which means that every party has to bear its own costs, irrespective of the outcome of the case. The defendant in the US court proceedings has thus incurred expenses to challenge the court's jurisdiction and wishes to be compensated for these costs on the basis of a substantive breach of contract (*i.e.* the arbitration agreement). The defendant (in the US court proceedings) initiates arbitration proceedings in Switzerland to claim (*inter alia*) for such compensation.

Jurisdiction

For an arbitral tribunal to be competent to award damages for the breach of an arbitration agreement, the arbitration agreement must also cover the claims for its breach. Whether this is the case in a particular context depends on the wording of the arbitration agreement. But arbitration agreements that are phrased broadly likely cover substantive claims for their potential breach

As analyzed in detail above, for an arbitral tribunal to be competent to award damages for the breach of an arbitration agreement, the arbitration agreement must also cover the claims for its breach. Whether this is the case in a particular context depends on the wording of the arbitration agreement. But arbitration agreements that are phrased broadly likely cover substantive claims for their potential breach as in the scenario just described.

In 2013, the Swiss Federal Tribunal specifically found that, under the Swiss *lex arbitri*, arbitral tribunals have jurisdiction to decide on claims for damages for breach of an arbitration agreement.[30]

A Substantive Obligation to Refrain from Litigation

Furthermore, a compensation claim requires a breach of a substantive obligation under the contract (here the arbitration agreement). In the present context, there must be a substantive obligation prohibiting that the parties start state court litigation instead of arbitration.

In 2010, the Swiss Federal Tribunal had to deal with an arbitral award addressing the issue of damages for breach of an arbitration agreement in a similar context as the one just described. The respondent in the arbitration had previously initiated state court proceedings in Israel, whereupon the claimant (in the arbitration) started arbitration proceedings in Switzerland claiming, *inter alia*, damages for the breach of the arbitration agreement under Swiss substantive law (in view of the initiation of court proceedings in Israel). The arbitral tribunal held, in a partial award, that the claimant was entitled to damages. The respondent (in the arbitration) then challenged this so-called »Second Partial and Interim Award« on the basis of Swiss *lex arbitri* (Art. 190 para. 2 PILS), submitting that an award for damages for breach of an arbitration agreement would infringe Swiss public policy and would therefore have to be set aside. The challenge failed. The Swiss Federal Tribunal held that there was no infringement of Swiss public policy when the arbitral tribunal decided to award damages for a breach of the arbitration agreement.[31]

In 2013, the Swiss Federal Tribunal had to decide whether, under the Swiss *lex arbitri*, arbitral tribunals have jurisdiction to award damages for breach of an arbitration agreement.[32] The facts of the case were as follows: The respondent in the arbitration had previously seized a state court in Greece. Thereupon, the claimant in the arbitration proceedings filed an arbitration request claiming, *inter alia*, damages as a consequence of its being taken to the Greek courts by the respondent. The arbitral tribunal applied English substantive law and awarded damages for the breach of the arbitration agreement. The respondent in the arbitration challenged this decision arguing, *inter alia*, that the arbitral tribunal had lacked jurisdiction and that it was wrong to order the respondent in the arbitration to compensate the claimant »*for a hypothetical and future breach of contract*«. The Swiss Federal Tribunal held that jurisdiction existed, rejecting the claimant's arguments by stating, *inter alia*, that »*the very introduction of this [court] proceeding is indeed a breach of*

30 Decision of the Swiss Federal Tribunal, BGer. 30.9.2013, 4A_232/2013 para. 3.4.2.

31 Decision of the Swiss Federal Tribunal, BGer. 11.2.2010, 4A_444/2009 para. 4.2.2.

32 Decision of the Swiss Federal Tribunal, BGer. 30.9.2013, 4A_232/2013 para. 3.4.2.

the arbitration clause and it cannot be denied that the Respondent will have an interest to be compensated for this breach, as it could undergo financial harm«.[33]

These two decisions demonstrate that, from a Swiss law perspective, substantive law obligations to refrain from initiating state court proceedings are in theory possible. Whether such an obligation exists in a particular case is a separate issue, of course. Among legal scholars, the question whether or not a model arbitration clause contains an implied term to refrain from initiating state court proceedings is debated.[34]

Assuming Swiss substantive law applies to the substantive parts of an arbitration agreement, damages for a breach of this agreement are awarded, if there is: (i) a breach of contract, (ii) a damage, (iii) a causal link between the breach of contract and the damage, and (iv) negligence or intention on the part of the party in breach.[35]

Let us turn to the breach of contract first. If the arbitration agreement expressly contains the rule that no state court proceedings must be initiated, there clearly is a breach in the scenario described above.

If no such express agreement exists, the arbitration agreement needs to be interpreted from an objective (third party observer's) point of view. Such interpretation takes into account the very nature of the arbitration agreement as well as the usual considerations of parties concluding such agreement. It is reasonable to assume that parties who have agreed on a clause stating that »*all disputes shall be resolved by arbitration*« intended to be obliged to refrain from filing a claim in state courts. The parties have agreed to arbitrate instead of litigating, *i.e.* their agreement relates to one specific dispute resolution system with clearly defined types of proceedings. It is reasonable to assume that the parties agreed not to deviate from this system.[36]

Moreover, such interpretation is likely to be in the (objective) interests of the parties (as assessed from an objective third party observer at the moment of the conclusion of the arbitration agreement). Depending on the procedural law and how it is applied in a specific case, if one party starts state court proceedings despite there being an arbitration agreement covering the same dispute, there may be a risk of parallel proceedings on the same subject matter if a state court finds that it is competent to adjudicate certain aspects of a dispute irrespective of the arbitration agreement.[37] In such a situation, a party's decision to initiate litigation would not only deviate from the parties' agreement but also cause unnecessary costs and, almost certainly, lead to unnecessary procedural complications.

In such a situation, a party's decision to initiate litigation would not only deviate from the parties' agreement but also cause unnecessary costs and, almost certainly, lead to unnecessary procedural complications

In summary, it appears as reasonable to hold that even if an arbitration agreement does not contain an express rule obliging the parties to refrain from starting state court proceedings it contains an implied term to this effect. This means that, in the typical scenario described above, there would be a breach.

Let us now turn to the damage suffered. Under Swiss substantive law, »damage« is defined as an involuntary decrease of assets.[38] However, in cases where a defendant decides to defend its case in the US, it knows that, even in a best case scenario in which the US court declines jurisdiction in view of the arbitration agreement, it will, under the applicable US rule on the allocation of costs, have to bear all of its own legal costs. The defendant (in the US proceedings) can, therefore anticipate that its assets will decrease through its own actions.

It is reasonable to assume that parties who have agreed on a clause stating that »*all disputes shall be resolved by arbitration*« intended to be obliged to refrain from filing a claim in state courts

The question is whether this decrease in assets is still to be considered as an involuntary decrease of assets. The defendant, as a prudent party, has to react adequately in order to avoid more serious harm, in particular that the claimant's »breach« would jeopardize the defendant's »right« to arbitration. Furthermore, the

33 Decision of the Swiss Federal Tribunal, BGer. 30.9.2013, 4A_232/2013 para. 3.4.2.

34 *Contra* a substantive obligation Berger, B./Kellerhals, F., op. cit. (fn. 2), para. 311 (with further references); *in favorem* of a substantive obligation Stacher, M., op. cit (fn. 19), para. 180.

35 Bucher, E., op. cit. (fn. 7), p. 303.

36 Born, G., op. cit. (fn.), p. 1271 states it as follows: "*The most fundamental negative obligation of an arbitration agreement is the commitment not to litigate disputes that are subject to arbitration; that obligation is paralleled by the (obvious) exclusivity of the agreement to arbitrate, which requires that all arbitrable disputes be resolved in, and only in, arbitral proceedings*." See also Stacher, M., op. cit. (fn. 19), para. 180.

37 See the decision of the Swiss Federal Tribunal, BGer. 11.2.2010, 4A_444/2009 para. 4.2, where an Israeli court accepted jurisdiction for one part of the dispute, which was subject to an arbitration agreement.

38 Stoessel, G.: Schadensberechnung nach der Differenztheorie – sowie kritische Bemerkungen zum "normativen Schaden", in: Fuhrer, S. (ed.), Schweizerische Gesellschaft für Haftpflicht- und Versicherungsrecht – Société suisse du droit de la responsabilité civile et des assurances. Festschrift zum fünfzigjährigen Bestehen – Mélanges à l'occasion de son cinquantième anniversaire, Schulthess, Zürich, 2010, p. 601-613, pp. 602 et seq.

defendant cannot be said to have had a real choice in the matter, which means that the defendant's position has to be equated with that of a party, which has suffered an involuntary decrease of assets. The defendant needs to defend itself before the state court at the very least by raising the arbitration exception. Even in cases where a state court must take into account an arbitration agreement *ex officio*, it may be necessary to draw the state court's attention to the fact that an arbitration agreement was concluded. In this context, seeking legal advice and guidance is necessary, and legal fees are generated, for which compensation may later be sought.

In conclusion, it is submitted that the defendant (in the state court proceedings) usually suffers damage in the legal sense according to Swiss law in the scenario described above.[39]

For the typical scenario described above, a causal link between the breach and the damage can be established without any further explanations as there would be no legal costs, had the claimant in the state court proceedings not initiated the proceedings.

Finally, the party in breach will in most cases have acted intentionally and will not be able to be excused for absence of fault, unless very exceptional circumstances apply.

Conclusion

All prerequisites for a claim for damages under Swiss law are met and damages can be awarded in principle in the scenario as described above.

Damages for the Non-Payment of the Advance on Costs

Typical Scenario

The claimant starts arbitration proceedings *e.g.* in Slovenia. The arbitral tribunal requires the parties to pay an advance on costs in equal shares. The respondent refuses to pay its share of the advance on costs. The claimant then substitutes the respondent's share in order to prevent the proceedings from being terminated. The claimant does not want to wait for the final decision on the allocation of costs in an arbitral award, but wishes to be compensated by having its substitution payment immediately reimbursed. The claimant may therefore allege a breach of the arbitration agreement and claim for substantive compensation in the arbitration proceedings.

Jurisdiction

As analyzed in detail above, for an arbitral tribunal to be competent to award compensation for the breach of an arbitration agreement, the original arbitration agreement (with the law governing it) must cover also the claim for its breach. Although the outcome will depend on the wording of a particular arbitration agreement, agreements with the typical wording of standard arbitration clauses are likely to cover substantive claims for compensation of the substituted part of the advance.

Substantive or Procedural Nature of the Provision to Pay the Advance on Costs

Irrespective of the tribunal's jurisdiction, a substantive claim for immediate reimbursement needs to be established.

The question of whether the parties of a relevant arbitration agreement have a substantive obligation to pay an advance on costs for the fees of the arbitrators is disputed among legal scholars in Switzerland and probably also outside of Switzerland.[40]

Some authors state that a substantive obligation to pay the advance on costs exists, emphasizing that the requirement to pay deposits in equal shares is usual practice in international arbitration and provided for

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39 See decision of the Swiss Federal Tribunal, BGer. 11.2.2010, 4A_444/2009 para. B.c; the fifth sentence, 16.3, contains a reference to Art. 97 of the Swiss Code of Obligations.

40 Advocating a substantive obligation: Rohner, Th./Lazopoulos, M.: Respondent's Refusal to Pay its Share of the Advance on Costs, in: ASA Bulletin, Alphen aan den Rijn, 2011, pp. 549-573; Stacher, M., op. cit (fn. 19), paras. 330-334, with further legal reference and a slightly different terminology; Stacher, M., para. 14 at Art. 38 Swiss Rules, in: Zuberbühler, T *et al.* (eds.): Swiss Rules of International Arbitration, Commentary, second edition, Schulthess, Zurich, 2013; Gränicher, D., op. cit. (fn. 24) para. 82 at Art. 178 PILS, with exemptions in abusive constellations; tentatively advocating a substantive obligation: Girsberger. D./Gabriel, S., op. cit. (fn. 20), pp. 828-829; *contra* such substantive obligation: Berger, B./Kellerhals, F., op. cit. (fn. 2), para. 312; Knellwolf, M.: Zur materiellrechtlichen Bedeutung der Schiedsabrede, in: Berti, St. V. *et al.* (eds.): Beiträge zu Grenzfragen des Prozessrechts, Schulthess, Zürich, 1991, (pp. 57 et seqq.), p. 57; Rüede, T./Hadenfeldt, R.: Schweizerisches Schiedsgerichtsrecht nach Konkordat und IPRG, second edition, Schulthess, Zürich, 1999, pp. 46, 80.

in many institutional arbitration rules.[41] Furthermore, these authors argue that the claimant should not be forced to pay the entire deposit and thus bear the full risk of the respondent's insolvency.[42]

Other authors state that the obligation to pay an advance on costs is of a purely procedural nature, pointing out that the relevant arbitration rules provide for sufficient (procedural) consequences in case of non-compliance. There would be no need and no room for substantive consequences.[43] Furthermore, there may be situations of abuse (on the part of the claimant) in which case a respondent might, with good reason, rely on the procedural default mechanism of the applicable arbitration rules and should not be forced to accept more than that.[44]

In the view of the authors, the issue of the advance on costs cannot generally be qualified as substantive or procedural. Rather, it depends on the specific agreement in this respect, which is often found in institutional arbitration rules that were incorporated to the arbitration agreement by reference.

If the parties agree to pay an advance on costs in equal shares, such payment obligation requires performance by the parties and must be considered as substantive in nature.[45] An example are the LAC Rules which provide in Article 47.3: »*The Claimant and the Respondent shall each pay half of the advance unless separate advances have been determined*«. This is an agreement that addresses the parties and requires them to perform by paying advances on costs.

If the parties, however, agree that the arbitral tribunal shall require advances on costs from the parties (without any direct payment obligation of the parties) the agreement rather affects the formation of the proceedings to be applied by the tribunal than an obligation that the parties themselves need to fulfil. Hence, such an agreement would have to be qualified as procedural in nature.[46] An example is Article 41.1 of the Swiss Rules which provides: »*The arbitral tribunal, once constituted, and after consulting with the Court, shall request each party to deposit an equal amount as an advance for the costs...*« At least on the face of it, this appears to be an agreement that addresses the arbitral tribunal and does not create any payment obligations for the parties.[47]

Hence, the former agreement is to be qualified as substantive and the latter one as procedural in legal nature. Dogmatically speaking, this results in a situation where in the former case substantive claims are available, whereas in the latter case (merely) procedural consequences apply.

Relevance of Agreed Non-Compliance Regime

The agreed non-compliance regime can give further indications on the legal nature of the agreement. Where, in addition to an agreement that addresses the tribunal (rather than the parties), only procedural consequences for non-compliance are mentioned, this further supports the procedural character of the agreement.

However, where an arbitration agreement expressly provides for a claim for reimbursement of the substituted part of the advance on costs together with procedural directions how it is to be treated, this is a clear indication for a substantive claim that can be directly enforced in arbitration proceedings. Examples for such clear reimbursement mechanisms as a consequence of non-performance of an advance on costs can be found in the LAC Rules, the Vienna Rules, the SCC Rules, or the LCIA Rules.[48] The language of the LAC Rules for example expressly provides: »*If the other party makes the [substitution] payment, the Arbitral Tribunal may, at the request of that party, make a separate award*

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41 See, *e.g.*, Art. 41 (2004) Swiss Rules; Art. 41 (2012) Swiss Rules; Art. 37 (2017) ICC Rules; Art. 45 SCC Rules.

42 See Gränicher, op. cit. (fn. 24), para. 82 at Art. 178 PILS.

43 See Berger/Kellerhals, op. cit. (fn. 2), paras. 312-313.

44 *E.g.*, the claimant may be an empty shell (in particular in cases where the entity was stripped of all assets after the arbitration agreement had been concluded), or a more solvent claimant may attempt to apply pressure upon a less solvent respondent by claiming, in the arbitration, an excessively high amount thus triggering an exaggerated advance payment. If the claimant were to be able to enforce such exaggerated advance payment on the respondent, it may (ab)use such pressure (*e.g.*, in settlement negotiations).

45 See above, distinction test.

46 See above, distinction test.

47 Some Swiss authors support at the same time that substantive consequences should nevertheless be available under the Swiss Rules: Stacher, M., op. cit. (fn. 40), Art. 41 Swiss Rules para. 19; Rohner, Th./Lazopoulos, M., op. cit. (fn. 40), pp. 553 et seqq. seem to advocate that the respondent who does not pay its share of the advance on costs is in any case (*i.e.* also when the Swiss Rules apply) in breach of its contractual obligation under the arbitration agreement towards the claimant.

48 Art. 47.4 LAC Rules; Art. 42.4 VIAC Rules; Art. 51.5 SCC Rules; Art. 24.5 LCIA Rules.

The language of the LAC Rules for example expressly provides: »*If the other party makes the [substitution] payment, the Arbitral Tribunal may, at the request of that party, make a separate award by which it orders the defaulting party to reimburse the other party for the paid advance*«

by which it orders the defaulting party to reimburse the other party for the paid advance«.[49]

At the same time, it is submitted that one should be reluctant to apply this kind of reimbursement regime, where arbitration agreements (including arbitration rules referred to therein) do not provide so. In international arbitration, it appears to be important that parties who come from different parts of the world and have different ideas about arbitration can in general trust in the language of arbitration rules. If the arbitration rules do not provide for a substantive reimbursement mechanism, its existence should not be lightly accepted.

Substantive Agreement without »Reimbursement Mechanism«

The ICC Rules for example provide for the following language in Article 37.2: »*The advance on costs fixed by the Court pursuant to this Article 37(2) shall be payable in equal shares by the claimant and the respondent.*« At the same time, there is no express mention of a reimbursement mechanism in Article 37 of the ICC Rules.

Probably a majority of authors opine that in such situations a reimbursement claim exists based on the substantive agreement of the parties to pay the advance on costs in equal shares.[50] In absence of procedural rules on how to implement such a reimbursement claim, the tribunal would have general discretion to order the applicable procedure.[51]

It could be an argument against this view that when the ICC revised the ICC Rules in 2012, it refrained from adding a reimbursement mechanism, even though it must have been discussed in the working group as *e.g.* the SCC Rules already provided so.

In conclusion, institutional arbitration rules increasingly offer specific mechanisms on how a claimant can claim reimbursement of the substituted advance on costs from the respondent. These reimbursement mechanisms work well in practice and help to avoid abusive non-payment of advances on costs by respondents

49 Art. 47.4 LAC Rules.

50 Rohner, Th./Lazopoulos, M.: Respondent's Refusal to Pay its Share of the Advance on Costs, in: ASA Bulletin, Alphen aan den Rijn, 2011, pp. 549-573; Stacher, M., op. cit (fn. 17), paras. 330-334, with further legal reference and a slightly different terminology; Stacher, M., op. cit. (fn. 40) para. 14 at Art. 38 Swiss Rules; Gränicher, D., op. cit. (fn. 22) para. 82 at Art. 178 PILS, with exemptions in abusive constellations; tentatively advocating a substantive obligation: Girsberger. D./Gabriel, S., op. cit. (fn. 18), pp. 828-829.

51 Schneider, M. E., Scherer, M., paras. 33 et seqq. at Art. 182 PILS, in: Honsell, H. *et al.* (eds.): Basler Kommentar, Internationales Privatrecht, third edition, Helbing Lichtenhahn, Basel, 2013.

Nevertheless, the authors of the present contribution expect that most tribunals would admit a reimbursement claim under the ICC Rules, even though it is not expressly provided for in the ICC Rules.

Prayers for Relief

As already stated above in detail, a substantive claim for damages needs to be brought within the ambit of the specific arbitration proceedings launched, or otherwise the arbitral tribunal will not be able to decide on this claim (even though it may be competent to do so, in theory, on the basis of the arbitration agreement).

Where substantive obligations to pay an advance on costs exist, the difficulty lies in the fact that, in practice, a claim may arise after the prayers for relief have been submitted in the arbitration. The question then arises whether it is possible to include additional prayers for relief into the arbitration proceedings launched, in order to seek reimbursement of the substitution payment made by the claimant with regard to the advance on costs. This problem is solved by arbitration rules that provide for an express reimbursement mechanism.

If no such reimbursement mechanism is agreed upon, it is recommended that the claimant introduces any alleged reimbursement claim as soon as possible after the respondent refused to pay its share of the advance. The request should contain a substantive prayer for relief and a procedural request for a partial award that needs to be rendered before the final award. Otherwise, the final cost allocation will take place in the final award anyway and there is no need for any reimbursement of the substituted advance on costs anymore.

Conclusion

In conclusion, institutional arbitration rules increasingly offer specific mechanisms on how a claimant can claim reimbursement of the substituted advance on costs from the respondent. These reimbursement mechanisms work well in practice and help to avoid abusive non-payment of advances on costs by respondents.

At the same time, it is submitted that arbitrators should be reluctant to apply these reimbursement mechanisms in the sense of general principles and irrespective of whether or not they are provided for in the applicable arbitration rules. In international

arbitration in particular, it appears to be important that parties who come from different parts of the world and may have different ideas about arbitration may rely on the language of their agreement.

Damages for the Disclosure of Confidential Information

Typical Scenarios

Parties necessarily exchange information in arbitration proceedings in form of legal submissions and evidence. This information may be necessary for proving a certain legal case, but may cause damage, if it is disclosed to (other) contract partners of a party or even to its competitors.

Such disclosure of confidential information can for example harm the reputation of a company or even substantially damage its business if trade secrets are disclosed to competitors.

Against this background, the question of the consequences in cases of confidentiality infringements arises.

Meaning of Confidentiality

For the present analysis, it is assumed that Article 50 of the LAC Rules applies *via* general reference to the LAC Rules in the arbitration agreement of the main contract:

> *»Confidentiality*
> *(i) 1. Unless otherwise expressly agreed by the parties, the LAC, the arbitrators and the emergency arbitrator shall maintain the confidentiality of the proceedings, the award, orders and other decisions of the Arbitral Tribunal. This obligation also applies to any expert appointed by the Arbitral Tribunal as well as to the members of the Board and the Secretariat.*
> *(ii) 2. Unless otherwise expressly agreed by the parties, the parties undertake to keep confidential all awards, orders and other decisions of the Arbitral Tribunal and all documents submitted in the proceedings by a party, which are not already publicly available, except where and to the extent that disclosure is required of a party by a legal duty or to protect or pursue its legal rights or to enforce or challenge an award before a judicial authority.*
> *(iii) […].«*

It follows that the parties agreed on a certain confidentiality standard as part of their arbitration agreement.

Jurisdiction

In line with the above analysis, it can be concluded that the arbitral tribunal has jurisdiction over (substantive) claims arising from the arbitration agreement.[52]

The qualification of any claims arising out of the confidentiality agreement will be analyzed in the next section.

Qualification

The confidentiality clause in the LAC Rules is an object lesson for how important it is to properly qualify individual parts of arbitration agreements.

The confidentiality clause in the LAC Rules is an object lesson for how important it is to properly qualify individual parts of arbitration agreements

Article 50 Paragraph 1 LAC Rules refers to the confidentiality obligations of the arbitrators and the members of the institution. These obligations require subsequent performance in the sense of non-disclosure and are therefore clearly substantive in nature.

At the same time, they do not address the relationship between the parties, but rather the relationship between the parties and the arbitrators (and the institution). Consequently, these substantive confidentiality obligations are not part of the arbitration agreement, but rather of the so-called »arbitrator agreement« between the parties and the arbitrators (*receptum arbitri*). This is a different legal relationship and, therefore, not relevant for the present analysis.[53]

Article 50 Paragraph 2 LAC Rules refers to the confidentiality obligations between the parties. Again, these obligations require subsequent performance by the parties in the sense of non-disclosure and are therefore clearly substantive in nature.

It follows that breach of this substantive confidentiality undertaking may result in substantive claims for damages and/or an injunctive relief if the substantive legal requirements under the applicable substantive law are met.

52 See above.

53 See in general: Girsberger, D./Voser, N.: International Arbitration: Comparative and Swiss Perspectives, third edition, Nomos/Schulthess, Zürich, 2016, para. 829.

Confidentiality obligations of the arbitral tribunal do, however, not form part of the arbitration agreement between the parties, but rather of the arbitrator agreement (*receptum arbitri*) between the parties and the arbitrators

Submission of Claims in Pending Proceedings

In situations where a breach of confidentiality obligations occurs in the course of pending arbitration proceedings the question of whether or not such breach can be addressed in these pending proceedings arises.

The answer depends on the stage of the proceedings and the procedural rules. If new prayers for relief can still be submitted according to the procedural rules, it should principally be possible to submit substantive claims for damages and/or an injunctive relief in the pending proceedings.

If the prayers for relief are admitted, the subject matter of the dispute includes the issue of the alleged breach of confidentiality obligations. On this basis, it will also be possible for a party to request interim injunctive relief from the arbitral tribunal that is responsible to adjudicate the respective prayers for relief. Hence, it appears advisable to try to include any confidentiality breaches in already pending proceedings: This allows for an instant interim relief by a tribunal that has already a general knowledge of the parties and the case, which can be most helpful in practice.[54]

If the submission of new prayers for relief should not be possible anymore in the pending proceedings, a party may have no other choice than to start new arbitration proceedings on the issue of the alleged breach of confidentiality, if this is considered as economically reasonable. In such situations, prompt interim relief can for example be obtained by referring the case to an emergency arbitrator.[55]

Conclusion

Confidentiality obligations are typically substantive in nature. This does not change if they are part of an arbitration agreement. Consequently, claims for damages or claims for injunctive relief are available to the extent that new prayers for relief can be introduced

Confidentiality obligations are typically substantive in nature. This does not change if they are part of an arbitration agreement. Consequently, claims for damages or claims for injunctive relief are available to the extent that new prayers for relief can be introduced in already pending proceedings. Otherwise, new proceedings will have to be started.

54 Gabriel S./Landbrecht, J. (upcoming): Of Confidentiality Orders and Confidentiality Offers, A Swiss Perspective on the Effect and Effectiveness of Measures to Protect Confidentiality, in: Austrian Yearbook on International Arbitration 2018, Manz, Wien, 2018.

55 *E.g.* in accordance with Art. 38 LAC Rules.

Confidentiality obligations of the arbitral tribunal do, however, not form part of the arbitration agreement between the parties, but rather of the arbitrator agreement (*receptum arbitri*) between the parties and the arbitrators. Even though confidentiality obligations of parties and arbitrators are often referred to in one and the same article contained in institutional arbitration rules, they refer to two different legal relationships with probably different jurisdictions and legal regimes.

Summary and Conclusions

Monetary compensation for breach of an arbitration agreement in pending arbitration proceedings requires that:

(i.) the arbitral tribunal has jurisdiction over the arbitration agreement;
(ii.) substantive parts of the arbitration agreement are affected; and
(iii.) new substantive claims can still be submitted in the pending proceedings.

If the first requirement should not be fulfilled, a party may still be in a position to submit its claims before a state court.

If the second requirement should not be fulfilled, a party may be limited to request procedural consequence (such as default), but no substantive relief such as damages.

If the third requirement should not be fulfilled, a party may still be in a position to submit its claims in new arbitration proceedings.

Against this background, every analysis on the consequences of the breach of an arbitration agreement should focus on the distinction between substantive and procedural parts of the arbitration agreement in the first place. Only substantive obligations may lead to substantive consequences such as damages.

The authors hope that the test for this distinction proposed herein above may proof as helpful for arbitration practitioners in Slovenia, Switzerland and maybe also other countries.

Arbitraža in konkurenčno pravo EU

Jakob Šešok

Jakob Šešok, mag. prav., je odvetniški pripravnik v Odvetniški pisarni Ulčar & partnerji d.o.o. Po uspešno zaključenem (cum laude) drugostopenjskem magistrskem študiju na Pravni fakulteti Univerze v Ljubljani se je v letu 2016 pridružil Odvetniški pisarni Ulčar & partnerji d.o.o., kjer se ukvarja s konkurenčnim pravom in reševanjem gospodarskih sporov. V letu 2015 je osvojil prvo mesto na 4. državnem tekmovanju iz gospodarskega prava – Prav(n)a rešitev. Je avtor več člankov s področja konkurenčnega in arbitražnega prava.

Uvod[1]

Pravna teorija in sodna praksa sta dolgo časa zavračali možnost arbitražnega reševanja konkurenčnopravnih sporov. Konkurenčno pravo je zaznamovano z javnopravnim elementom, zato naj bi bila po tradicionalnem stališču za to vrsto sporov bolj primerna redna – državna sodišča. Po sprejemu odločitev v zadevah *Mitsubishi*[2] in *Eco Swiss*[3], je v mednarodnem pravu postalo splošno sprejeto, da so lahko tudi konkurenčni spori predmet arbitražnega odločanja.

V preteklosti je veljalo, da so temeljni elementi arbitražnega odločanja, zlasti poudarjena avtonomija strank, v nasprotju s konceptom javnega interesa.[4] Manjša zahteva po obrazložitvi, dokončnost arbitražne odločbe (odsotnost pravnih sredstev) in omejena možnost sodnega nadzora naj bi nasprotovali konceptu oblastnega odločanja, ki je značilen za konkurenčnopravne organe in državna sodišča.[5]

Nasprotniki arbitražnega reševanja konkurenčnih sporov so ob tem poudarjali, da lahko podjetja, zaradi zaupne narave arbitraže, prikrijejo lastne kršitve konkurenčnih norm, ne da bi zanje izvedeli pristojni oblastni organi.[6] Kot je Sodišče Evropske unije (SEU)[7] zapisalo v zadevi *Aéroports Paris*[8]: »*Javnopravna narava konkurenčnega prava narekuje kogentno uporabo pravil in prepoveduje, da bi jih podjetja obšla z lastnimi dogovori*«. Znan je primer, ko naj bi italijanska in francoska družba sklenili nedovoljen kartelni sporazum o geografski delitvi trga in ga nato v enem samem izvodu deponirale v sef švicarske banke. Sporazum je določal uporabo švicarskega prava in vključeval arbitražno klavzulo, ki je predvidevala pristojnost arbitraže s sedežem v Švici.

Po sprejemu odločitev v zadevah *Mitsubishi* in *Eco Swiss*, je v mednarodnem pravu postalo splošno sprejeto, da so lahko tudi konkurenčni spori predmet arbitražnega odločanja

1 Posebna zahvala gre odvetnici Dr. Tini Drolec Sladojević, ki je prispevala koristne komentarje k osnutku pričujočega prispevka.

2 Sodba Vrhovnega sodišča ZDA (*US Supreme Court*) v zadevi *Mitsubishi Motors Corp. proti Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614 (1985), 2. julij 1985.

3 Sodba SEU v zadevi *Eco Swiss China Time Ltd. proti Benetton International BV,* C-126/97, 1. junij 1999.

4 Tudi v nekdanjem jugoslovanskem pravu je veljalo stališče, da spori zaradi kršitev konkurenčnega prava niso arbitrabilni. Gl. tudi Ude, L.: Arbitražno pravo, GV Založba, Ljubljana. 2004, str. 68.

5 Primerjaj sodbo ameriškega pritožbenega sodišča za drugo okrožje (*U.S. Court of Appeals for the Second Circuit*) v zadevi *American Safety Equipment Corp. proti J.P. Maguire & Co.*, 391 F.2d 821, 20. marec 1968. Sodišče je v navedeni zadevi razvilo t.im. doktrino *American Safety* in odločilo, da so konkurenčne zadeve preveč pomembne za javni interes, da bi o njih lahko odločala arbitraža. Omenjena doktrina je bila kasneje razveljavljena z zadevo *Mitsubishi*.

6 Komninos, A.: Arbitration and EU Competition Law, gradivo University College London – Faculty of Laws, dostopno na: <https://papers.ssrn.com/sol3/papers.cfm?abstract-id=1520105>, str. 5 (16. 6. 2017).

7 Okrajšava SEU se v tem delu uporablja tako za odločbe Sodišča Evropske unije kot tudi odločbe Splošnega sodišča EU.

8 Sodba SEU v zadevi *Aéroports Paris proti Komisiji*, T-128/98, 12. december 2000, para. 241. Besedilo v angleškem izvirniku sodbe: »*The public policy nature of competition law is specifically designed to render its provisions mandatory and to prohibit traders from circumventing them in their agreements.*«.

Ko je med strankama nastal spor, so arbitri sicer lahko vpogledali v omenjeni sporazum, vendar so jim stranke prepovedale, da bi v arbitražni odločbi kakorkoli omenjali določbe spornega protikonkurenčnega sporazuma. Ker je bil edini izvod sporazuma deponiran v bančnem sefu, so s tem želele doseči, da nobena izmed pristojnih konkurenčnih oblasti ne bi izvedela za kršitve konkurenčnega prava.[9]

Iz narave regulatornega odločanja izhaja, da arbitražni senat v nobenem primeru ne more odločati o stvareh, ki spadajo v izključno pristojnost konkurenčnopravnih organov, kot sta Javna agencija Republike Slovenije za varstvo konkurence (Agencija) ali Evropska komisija (Komisija). Tako arbitri denimo ne morejo izreči upravne sankcije v obliki denarne globe zaradi sklepanja omejevalnih sporazumov ali zlorabe prevladujočega položaja po 101. oziroma 102. členu Pogodbe o delovanju Evropske unije (PDEU).[10] Gre za suverene prerogative konkurenčnih oblasti, ki jih arbitražni tribunali, kot subjekti zasebnega prava, ne uživajo.

Kljub začetnim zadržkom, se je ob postopni rasti zaupanja v alternativno reševanje sporov razvilo spoznanje, da arbitraža sicer ne more prevzeti tradicionalnih oblastnih nalog konkurenčnopravnih organov, vendar lahko kljub temu odloča o zasebnopravnih elementih konkurenčnega prava.[11]

Arbitri se s konkurenčnim pravom v bistvenem srečujejo v dveh kategorijah primerov. Najpogosteje arbitraža odloča o sporu, ki nastane zaradi kršitve distribucijske, prodajne, licenčne ali druge podobne pogodbe, ki vsebuje arbitražno klavzulo

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Redkeje bo arbitraža odločala v primerih, ko tožnik uveljavlja neposlovno odškodninsko odgovornost toženca. Takšni primeri obsegajo zlasti situacije, ko neposredni kupci podjetja, udeleženega v nedovoljenem kartelnem sporazumu, zahtevajo odškodnino, ki nastane zaradi protikonkurenčnega ravnanj

Kot bo podrobneje prikazano v nadaljevanju, je od sprejema sodb v zadevah *Mitsubishi* in *Eco Swiss* jasno, da arbitri v zasebnopravnih sporih[13] lahko odločajo o kršitvah konkurenčnopravnih pravil. Takšno stališče je zdaj zastopano v vseh gospodarsko pomembnejših jurisdikcijah (*favor arbitrandi*).[14]

Arbitrabilnost konkurenčnega prava

Sodna praksa Vrhovnega sodišča ZDA: Mitsubishi proti Soler

Vrhovno sodišče ZDA (VS ZDA) je v zadevi *Mitsubishi* presojalo, ali arbitražni tribunal lahko odloča v sporu med dvema zasebnopravnima subjektoma, če eden izmed njiju uveljavlja kršitev konkurenčnega prava. V obravnavanem primeru je spor potekal med japonsko družbo *Mitsubishi Motors Corporation* (Mitsubishi) in švicarsko družbo *Chrysler International, S.A.* (CISA) na eni, ter portoriško družbo *Soler Chrysler-Plymouth, Inc* (Soler) na drugi strani. Soler je z Mitsubishijem in CISA sklenil dve pogodbi, s katerimi se je v bistvenem zavezal, da bo trgovcem avtomobilov zunaj kontinentalnih ZDA[15] dobavljal Mitsubishijeve in Chryslerjeve proizvode. Ena izmed pogodb je vsebovala široko arbitražno klavzulo[16], ki je določala, da bo vse morebitne

9 Werner, J.: Application of Competition Laws by Arbitrators – The Step Too Far, v: Journal of International Arbitration, št. 12/1995, str. 23-24. Avtor naj bi za omenjeni primer izvedel pri pogovorih z zaposlenimi na direktoratu Evropske komisije za konkurenco, pri čemer ni mogoče z gotovostjo preveriti, ali je do omenjenega primera resnično prišlo.

10 Pogodba o delovanju Evropske unije (UL C 115 z dne 9. maja 2008.) Smiselno enako po 6. oziroma 9. členu Zakona o preprečevanju omejevanja konkurence (ZPOmK-1) (Ur. l. RS, št. 36/08 s sprem.).

11 Beechey, J.: Arbitrability of Anti-trust/Competition Law Issues – Common Law, v: Arbitration International, št. 2/1996, str. 179-185.

12 Komninos, A.: nav. delo, str. 7.

13 Prim. npr. 62. člen ZPOmK-1: »(1) Oseba, ki je utrpela škodo, povzročeno s kršitvijo konkurenčnega prava (v nadaljnjem besedilu: oškodovanec), ima pravico do povrnitve škode (v nadaljnjem besedilu: odškodnina) po splošnih pravilih zakona, ki ureja obligacijska razmerja, če ni s tem zakonom določeno drugače. (2) Kršitelj, ki je povzročil škodo, dolguje oškodovancu zamudne obresti od nastanka škode do plačila ne glede na to, kdaj je oškodovanec vložil zahtevek za povrnitev škode, povzročene s kršitvijo konkurenčnega prava (v nadaljnjem besedilu: odškodninski zahtevek)«.

14 Komninos, A.: nav. delo, str. 8-9.

15 Celinske ZDA so skupina 48 zveznih držav ZDA in zveznega ozemlja v osrednjem delu, ki izključuje zvezni državi Aljasko in Havaje ter nekatera druga ozemlja pod upravo ZDA, kot je tudi Portoriko.

16 Besedilo arbitražne klavzule v angleškem izvirniku: »*All disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordan-*

spore in nesoglasja, ki nastanejo med Mitsubishijem in Solerjem, reševala arbitraža s sedežem na Japonskem, ki bo odločala skladno s pravili japonskega arbitražnega razsodišča.[17]

Zaradi upada povpraševanja po novih avtomobilih, Soler sčasoma ni več mogel kupovati pogodbeno dogovorjenih količin (kvote), ki bi jih moral odkupiti od Mitsubishija. Iz istega razloga je zaprosil, da bi mu Mitsubishi in CISA dopustila, da njune proizvode distribuira izven pogodbeno omejenega geografskega območja. Slednja sta zahteve po spremembi pogodbene ureditve zavrnila in – po neuspešnih poizkusih mirne rešitve spora – vložila arbitražni zahtevek pred japonskih arbitražnim razsodiščem ter tožbo v ZDA, s katero sta zahtevala, da se Soler aktivno vključi v arbitražni postopek. Soler je v ZDA zoper Mitsubishi in CISA naperil nasprotni zahtevek, s katerim je med drugim zatrjeval, da sta nasprotni stranki kršili kogentne določbe ameriškega konkurenčnega zakona, *Sherman Act*[18], zaradi česar predmetni spor ne more biti predmet arbitraže. Ob tem se je Soler skliceval na do tedaj uveljavljeno doktrino *American Safety*, ki je načeloma odklanjala arbitrabilnost konkurenčnopravnih sporov.[19] Po več sodbah nižje stopenjskih sodišč, je o zadevi končno odločalo VS ZDA. Slednje je v obširni sodbi odločilo, da so tudi konkurenčnopravni spori lahko predmet arbitražnega reševanja sporov. Ob tem je izpostavilo več razlogov, ki narekujejo arbitrabilnost sporov in jim kaže posvetiti pozornost.

Prvič, arbitražna klavzula, ki določa pristojnost arbitražnega tribunala za vse vrste nesoglasij, ki nastanejo med strankama, zajema tudi spore, povezane s kršitvijo kogentnih zakonskih določb, četudi gre za določbe konkurenčne zakonodaje, ki so primarno namenjene varstvu javnega interesa. Če se stranka odpove sodnemu uveljavljanju zahtevkov na podlagi kogentnih določb, se s tem ne odpove materialnemu varstvu, ki ga zagotavljajo, temveč določi zgolj pristojnost drugega foruma (arbitraže) za rešitev konkretnega spora. Drugič, narava mednarodne trgovine zahteva, da pravna varnost, ki jo prinaša učinkovito reševanje sporov, prevlada nad javnim konkurenčnopravnim interesom posamezne države. Temeljna značilnost mednarodne arbitraže, ki spodbuja sklepanje mednarodnih poslovnih vezi je ta, da se stranki iz različnih držav dogovorita za forum reševanja sporov, ki je sprejemljiv za obe strani. Ta prednost arbitražnega reševanja sporov bi bila izničena, mednarodna trgovina pa močno okrnjena, če bi v konkurenčnopravnih sporih veljala izključna pristojnost sodišč določene države.[20] Tretjič, čeprav je za arbitražo značilna ekonomičnost in hitrost postopka, to ne preprečuje strokovne in premišljene odločitve o zapletenih konkurenčnopravnih vprašanjih. Stranke v mednarodnih arbitražah običajno razpolagajo s sredstvi, ki jim omogočajo imenovanje izvedencev ali strokovnih prič, ki razpolagajo z zadostnim strokovnim znanjem. Poleg tega lahko izberejo arbitra, strokovnjaka za določeno pravno področje, na primer za določene vrste proti konkurenčnih ravnanj.[21] Slednje pred rednimi sodišči, zlasti v sistemih, ki poznajo načelo naravnega sodnika, navadno ni mogoče. Končno, arbitrabilnost narekuje tudi t.im. *second look* doktrina. Skladno z navedeno idejo, ki jo je razvilo VS ZDA, javni interes v nobenem primeru ni ogrožen, saj pravilnost arbitražne odločbe v postopku razveljavitve ali izvršitve preveri tudi pristojno državno sodišče.[22]

Sodna praksa Sodišča EU: Eco Swiss proti Benetton

SEU je arbitrabilnost konkurenčnih sporov presojalo v zadevi *Eco Swiss*. Uvodoma velja spomniti, da se lahko priznanje in izvršitev arbitražne odločbe na podlagi 2(b) odstavka 5. člena Newyorške konvencije o priznanju in izvrševanju tujih arbitražnih odločb[23] (Newyorška konvencija) zavrne, če pristojni organ države, v kateri se zahteva priznanje in izvršitev odločbe ugotovi, da bi bilo priznanje ali izvršitev odločbe v nasprotju z javnim redom te države.[24] Podobno Vzorčni

Arbitražna klavzula, ki določa pristojnost arbitražnega tribunala za vse vrste nesoglasij, ki nastanejo med strankama, zajema tudi spore, povezane s kršitvijo kogentnih zakonskih določb, četudi gre za določbe konkurenčne zakonodaje, ki so primarno namenjene varstvu javnega interesa. Če se stranka odpove sodnemu uveljavljanju zahtevkov na podlagi kogentnih določb, se s tem ne odpove materialnemu varstvu, ki ga zagotavljajo, temveč določi zgolj pristojnost drugega foruma (arbitraže) za rešitev konkretnega spora

ce with the rules and regulations of the Japan Commercial Arbitration Association«.

17 Ang.: »*Japan Commercial Arbitration Association*«.

18 The Sherman Antitrust Act (26. Stat. 209, 15. U.S.C., 1890).

19 Skladno z omenjeno doktrino naj arbitraža, ki primarno stremi k pospešenemu in preprostejšemu reševanju sporov, ne bi bila primerna za reševanje zapletenih konkurenčnopravnih vprašanj. Prav tako naj arbitri, kot razsodniki, ki pogosto prihajajo iz poslovnega okolja, ne bi bili zmožni neodvisno odločati vprašanjih, ki imajo neposredne posledice za njihovo sicersnje delovno področje. Gl. tudi Finn, J.J.: Private Arbitration and Antitrust Enforcement: A Conflict of Policies, v: Boston College Law Review, št. 1/1969, str. 406.

20 Prim. tudi sodbo VS ZDA v zadevi *The Bremen proti Zapata Off-Shore Co.*, 407 U.S. 1 (1972), 12 junij 1972.

21 Prim. tudi Ude, L.:, nav. delo, str. 48-50.

22 Radicati Di Brozolo, G. L.: Arbitration and Competition Law: The Position of the Courts and of Arbitrators, v: Arbitration International, št. 1/2011, str. 5.

23 Konvencija o priznanju in izvršitvi tujih arbitražnih odločb, sprejeta v New Yorku dne 10. 6. 1958 (Ur. l. SFRJ, št. 11/89).

24 Bermann, G. A.: Navigating EU Law and the Law of International

Vzorčni zakon UNCITRAL in nacionalne zakonodaje držav članic EU predvidevajo, da lahko sodišče arbitražno odločbo razveljavi, če ugotovi, da je le-ta v nasprotju z javnim redom. SEU je v obravnavanem primeru odločalo o vprašanju, ali konkurenčno pravo tvori javni red EU in lahko, kot tako, predstavlja podlago za razveljavitev arbitražne odločbe pred nacionalnimi sodišči

zakon UNCITRAL[25] in nacionalne zakonodaje držav članic EU[26] predvidevajo, da lahko sodišče arbitražno odločbo razveljavi, če ugotovi, da je le-ta v nasprotju z javnim redom. SEU je v obravnavanem primeru odločalo o vprašanju, ali konkurenčno pravo tvori javni red EU in lahko, kot tako, predstavlja podlago za razveljavitev arbitražne odločbe pred nacionalnimi sodišči.

Postopek za predhodno vprašanje je v predmetni zadevi izhajal iz spora, ki je nastal med družbo *Benetton International NV* (Benetton) na eni, ter družbama *Eco Swiss China Time Ltd.* (Eco Swiss) in *Bulova Watch Company Inc.* (Bulova), na drugi strani. Omenjene stranke so sklenile licenčno pogodbo, na podlagi katere sta Eco Swiss in Bulova lahko proizvajala in prodajala ure pod blagovno znamko »*Benetton by Bulova*«. Pogodba je predvidevala, da Eco Swiss licenčnih proizvodov ni smel prodajati v Italiji, Bulova pa jih ni smela prodajati kjerkoli drugje v EU, kot v Italiji. Pogodba je torej predvidevala dogovor o geografski delitvi trga. Benetton je pogodbo predčasno odpovedal, zato sta ga jemalca licence v arbitražnem postopku tožila zaradi škode, ki jima je pri tem nastala. Arbitražna klavzula je predvidevala pristojnost nizozemskega Arbitražnega inštituta (*Nederlandse Arbitrage Instituut*). Eco Swiss in Bulova sta z odškodninskim zahtevkom uspela, pri čemer je arbitraža Benettonu naložila plačilo večmilijonske odškodnine.[27] Benetton je nato pri pristojnem sodišču vložil tožbo na razveljavitev arbitražne odločbe, saj naj bi bila licenčna pogodba nična, ker je predstavljala nedovoljen dogovor po 101. členu PDEU. Omenjena norma v 1. odstavku prepoveduje vse sporazume med podjetji, ki določajo razdelitev trgov in virov nabave. Ker je licenčna pogodba predvidevala geografsko delitev trgov, naj bi bila nična.

Ob tem je treba izpostaviti, da Benetton omenjenega ugovora (tj. ničnost licenčne pogodbe) ni uveljavljal v arbitražnem postopku, temveč šele v tožbi na razveljavitev arbitražne odločbe. Po dolgotrajnih sodnih postopkih je nizozemsko Vrhovno sodišče (*Hoge Raad der Nederlanden*) na SEU naslovilo več predhodnih vprašanj, ki so v bistvenem zajemala dva glavna problema: (a) ali lahko nacionalno sodišče razveljavi arbitražno odločbo, ker ta nasprotuje konkurenčnim določbam PDEU in je kot takšna v nasprotju z javnim redom in (b) ali lahko arbitražno odločbo razveljavi zaradi kršitve konkurenčnega prava, čeprav nobena izmed strank v arbitražnem postopku ni uveljavljala tovrstnih ugovorov.

SEU je v sodbi o predhodnem vprašanju primarno odločilo, da konkurenčna pravila PDEU tvorijo javni red EU in njenih držav članic. Kršitev konkurenčnih pravil je tako v nasprotju z evropskim javnim redom in posledično veljaven razlog za razveljavitev arbitražne odločbe. Prav tako kršitev konkurenčnih pravil predstavlja razlog za odklonitev priznanja ali izvršitve tuje arbitražne odločbe.

Navedena odločitev ima bistven pomen za arbitre, ki sodelujejo v postopkih, pri katerih obstaja možnost, da bo upnik izvršitev arbitražne odločbe zahteval v kateri izmed držav članic EU. Arbitri v teh postopkih morajo načeloma vselej *ex officio* uporabiti konkurenčna pravila EU, četudi stranke arbitražnega postopka tega ne predlagajo.[28] V nasprotnem primeru tvegajo, da bo sodišče v državi izvršbe – zaradi ugovora javnega reda – zavrnilo izvršitev arbitražne odločbe, ki je v nasprotju s kogentnimi konkurenčnimi normami. Gre za rešitev, ki se odmika od tradicionalnega pojmovanja arbitraže, kot instituta, kjer prevladuje avtonomija strank. Čeprav se zdi, da je tovrstno pojmovanje pridržka javnega reda preveč ekstenzivno, je od sodbe v zadevi *Eco Swiss* dokončno jasno, da so konkurenčni spori tudi v EU lahko predmet arbitraže.[29]

Odločitvi v zadevi *Eco Swiss* so sčasoma sledila tudi sodišča v posameznih državah članicah EU.[30] Izpostaviti

Arbitration, v: Arbitration International, št. 3/2012, str. 408-409.

25 Vzorčni zakon UNCITRAL o mednarodni trgovinski arbitraži z dne 21. 6. 1985 (*UNCITRAL Model Law on International Commercial Arbitration*). Gl. 2(b) odstavek 34. člena UNCITRAL Vzorčnega zakona: »*An arbitral award may be set aside by the court specified in article 6 only if: [...] the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the award is in conflict with the public policy of this State.*«

26 Gl. npr. 2. točko 2. odstavka 40. člena Zakona o arbitraži (ZArbit) (Ur. l. RS, št. 45/08 s sprem.): »*Arbitražno odločbo lahko sodišče razveljavi le: [...] če sodišče po uradni dolžnosti ugotovi: (i) da predmet spora ne more biti predmet arbitražnega sporazuma (4. člen); (ii) da je arbitražna odločba v nasprotju z javnim redom Republike Slovenije.*«

27 Arbitraža je Benettonu naložila, da izplača znesek (i) 23.750.000 USD družbi Eco Swiss in (ii) 2.800.000 USD družbi Bulova.

28 Radicati Di Brozolo, G. L.: Arbitration and Competition Law: The Position of the Courts and of Arbitrators, v: Arbitration International, št. 1/2011, str. 10.

29 Prav tam.

30 Pritožbeno sodišče za Bruselj je denimo v zadevi *SNF proti Cytec Industrie* z dne 8. marca 2007 odločilo, da arbitražna odločba ni izvršljiva, ker nasprotuje 101. členu PDEU in posledično javnemu redu.

velja Francijo, kjer civilni zakonik (*Code civil*) prepoveduje arbitražo v zadevah, ki so povezane z javnim interesom.[31] Kljub temu so sodišča v zadevah *Alamira*[32], *Labinal*[33] *in Aplix*[34] razvila prakso, po kateri arbitri ne le lahko, temveč morajo uporabiti kogentne norme konkurenčnega prava.[35]

Izbira relevantnega prava

Ob ugotovitvi, da morajo arbitri *ex officio* uporabiti kogentne konkurenčnopravne določbe, se postavlja vprašanje, materialno pravo katerega konkurenčnopravnega reda morajo upoštevati.

V arbitražni praksi so se izoblikovali trije temeljni načini določanja uporabe relevantnega materialnega prava. Skladno z načelom avtonomije strank arbitri navadno odločajo na podlagi pravnih pravil, ki so jih za presojo vsebine pravnega razmerja izbrale stranke (*lex contractus*). Če stranke niso izbrale materialnega prava, arbitražni senat odloči na podlagi pravnih pravil, ki jih šteje za primerna. Pri določanju relevantnega prava lahko pride v poštev tudi pravo sedeža arbitraže (*lex arbitri*). Arbitražni senat lahko odloči po pravičnosti (*ex aequo et bono*), če ima za to izrecno pooblastilo strank.[36]

Določitev relevantnega konkurenčnega prava je bistveno težja in vedno ne sledi zgoraj opisanemu mehanizmu. Kljub morebitnemu dogovoru strank o uporabi prava določene države, bo moral arbitražni senat preučiti tudi kogentne konkurenčne norme vseh tistih držav, kjer utegne priti do izvršitve arbitražne odločbe (*lex executionis*). V nasprotnem primeru tvega, da bodo nacionalna sodišča v državi izvršbe štela, da je odločba v nasprotju z javnim redom in posledično pravno neupoštevna. Denimo, da postopek pred arbitražo s sedežem v Švici poteka med nemško in ameriško družbo, ki sta dogovorili uporabo švicarskega prava. Kljub dogovoru o uporabi švicarskega materialnega prava, bodo morali arbitri presojati tudi konkurenčno pravo ZDA, Nemčije in EU. Ker gre za ameriško oziroma nemško družbo obstaja verjetnost, da imata družbi največ premoženja prav v omenjenih državah, ki sta zato najbolj verjetna foruma izvršbe. Ker je Nemčija del EU, morajo arbitri uporabiti tudi konkurenčni *acquis communautaire*. Samo na ta način bodo lahko ravnali s svojo splošno obveznostjo[37] – tj. da izdajo arbitražno odločbo, ki je izvršljiva.[38]

Ob ugotovitvi, da morajo arbitri *ex officio* uporabiti kogentne konkurenčnopravne določbe, se postavlja vprašanje, materialno pravo katerega konkurenčnopravnega reda morajo upoštevati

Podobno tudi kriterij *lex arbitri* ne daje zanesljivega odgovora na določitev uporabnega prava. Denimo, da spor poteka pred arbitražo s sedežem v Švici, pri čemer pogodbeno razmerje, ki je podlaga spora nima vpliva na švicarski trg, izkrivlja pa konkurenčne razmere na trgu EU, ZDA in Hong Konga. Čeprav bi kriterij *lex arbitri* nakazoval uporabo švicarskega prava, to ne bo uporabno, saj nima sporno razmerje nikakršne zveze s švicarskimi konkurenčnimi razmerami. V tem pogledu je naloga arbitrov bistveno težja, kot naloga rednih sodišč. Slednja so praviloma dolžna uporabiti (zgolj) norme države, ki je sedež sodišča, zlasti v primeru sporov konkurenčnega prava. Arbitri imajo na drugi strani dolžnost, da izdajo odločbo, ki bo univerzalno izvršljiva. Navedena dolžnost primarno izhaja iz 42. člena Pravil ICC in danes velja za splošno arbitražno načelo.[39]

Težava nastane, ker arbitri ne bodo vselej sposobni *ex ante* predvideti potencialnega foruma izvršbe. Takšen kriterij je tudi sicer presplošen in ne zagotavlja pravne varnosti in učinkovitosti postopka. Postavlja se torej vprašanje, na podlagi katerih otipljivih pravil lahko arbitražni senat odloči kogentne norme katere države ali skupnosti (v primeru EU) bo uporabil. Ob tem nastane nov pravni zaplet: arbitražni senat je tvorba zasebnega prava, ki ne pripada nobeni državi. Sedeža arbitraže zato ni mogoče šteti za forum, ki bi terjal uporabo kolizijskih norm države tribunala, kot to velja za državna sodišča. Nasprotno, arbitražni senat kot brezdržavni subjekt ni podvržen nobenim kolizijskim

31 2060. člen francoskega Civilnega zakonika (2004).

32 Sodba pritožbenega sodišča za Pariz (*Cour d'Appel de Paris*) v zadevi *Société Almira Films proti Pierrel,* 6. februar 1989.

33 Sodba pritožbenega sodišča za Pariz (*Cour d'Appel de Paris*) v zadevi *Labinal proti Mors et Westland Aerospace*, 19. maj 1993.

34 Sodba pritožbenega sodišča za Pariz (*Cour d'Appel de Paris*) v zadevi *Aplix proti Velcro*, 14. oktober 1993.

35 López-Galdoz, M.: Arbitration and Competition Law: Integrating Europe Through Arbitration, v: Journal of European Competition Law & Practice, št. 6/2016, str. 386.

36 Ude, L.:, nav. delo, str. 119-128. Gl. tudi 32. člen ZArbit in 28. člen Vzorčnega zakona UNCITRAL.

37 Blanke, G.: The Use and Utility of International Arbitration in EC Commission Merger Remedies: A Novel Supranational Paradigm in the Making, Europa Law Publishing, Leiden. 2006, str. 36.

38 Skladno z 42. členom Arbitražnih pravil Mednarodne trgovinske zbornice (*International Chamber of Commerce*) si morajo arbitri vselej prizadevati, da bo izdana arbitražna odločba tudi izvršljiva.

39 Radicati Di Brozolo, G. L.: Arbitration and Competition Law: The Position of the Courts and of Arbitrators, v: Arbitration International, št. 1/2011, str. 15.

pravilom, ki bi jasno določala norme katere države morajo arbitri uporabiti v sporih z mednarodnim elementom. Arbitrom ob odsotnosti jasnih kolizijskih pravil zato ne preostane drugega, kot da uporabno pravo določijo z združevanjem več različnih naveznih okoliščin. Uporaba enega samega kriterija ne bo nujno prinesla pravilnih rezultatov.[40]

Primer smotrne uporabe več kolizijskih kriterijev, ki so pripeljali do določitve najbolj primernega konkurenčnega prava, izhaja iz arbitraže, ki je pod okriljem ICC potekala pod št. 8626[41]. Arbitražni senat s sedežem v Ženevi (Švica) je odločal o sporu iz licenčne pogodbe, med ameriškim dajalcem in švicarskim jemalcem licence, ki je določala uporabo prava zvezne države New York. Arbitražni senat je ob primerjavi kriterijev *lex contractus*, *lex arbitri* in na podlagi splošno veljavne dolžnosti, da izda izvršljivo odločbo, odločil, da uporabi konkurenčno pravo EU:

- Arbitražni senat je najprej pojasnil, da pravo zvezne države New York (*lex contractus*) vključuje pravno zavezujoči precedens, ki ga je VS ZDA postavilo v zadevi *Mitsubishi*. V citirani zadevi je VS ZDA odločilo, da mora japonski arbitražni senat (zaradi varstva javnega reda) uporabiti ameriško pravo, čeprav je pogodba predvidevala uporabo švicarskega prava (*lex causae*). Iz istega razloga so arbitri v zadevi št. 8626 šteli, da morajo za zaščito javnega reda uporabiti konkurenčno pravo EU in to kljub dejstvu, da je pogodba določala uporabo ameriškega prava.

- Arbitražni senat je nato pozornost posvetil švicarskemu pravu, kot pravu *lex arbitri*. Kolizijske norme švicarskega prava so potrdile zaključek, ki ga je ponujal kriterij *lex contractus*. Iz ustaljene prakse švicarskega Vrhovnega sodišča (*Bundesgericht*) v zadevi *G.S.A.*[42] namreč izhaja, da je arbitražni senat s sedežem v Švici upravičen uporabiti konkurenčno pravo EU.

- Arbitražni senat je v zadnjem koraku upošteval tudi Pravila ICC in splošna načela arbitražnega postopka. Tudi ta so odkazovala na uporabo prava EU. Temeljna obveznost arbitrov je, da izdajo izvršljivo odločbo. Arbitražni senat je ocenil, da bo odločba najverjetneje izvršena v Nemčiji (sedež toženca), zato mora v vsakem primeru uporabiti pravo EU. Nemška sodišča odločbe namreč ne bi izvršila, če bi bila v nasprotju s 101. členom PDEU.

V praksi ne bo veliko primerov, ko vsi kriteriji pripeljejo do istega zaključka, kot v zadevi št. 8626. Mogoče je, da razmerje, ki je predmet spora, v ničemer ne vpliva na konkurenčne razmere v državi sedeža arbitraže oziroma, da dogovorjeno pravo ni povezano z državo, v kateri bo prišlo do izvršitve. V takih primerih bodo morali arbitri ob upoštevanju vseh okoliščin primera in po skrbnem preudarku izbrati kogentne norme ustreznega konkurenčnopravnega reda.[43]

Izpostaviti je treba, da se arbitri (vsaj v določenih primerih) ne bodo mogli izogniti izbiri relevantnega prava tako, da bi iz previdnosti presojali konkurenčne norme več držav. Čeprav so si konkurenčnopravni sistemi modernih držav v veliki meri podobni, obstajajo med njimi – zlasti EU in ZDA – tudi pomembne razlike

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Izbira prava in avtonomija strank

Iz zgoraj prikazanega izhaja, da morajo arbitri *ex officio* uporabiti kogentne norme konkurenčnega prava, ki se bo v določenih primerih razlikovalo od *lex causae*, sicer tvegajo, da bo odločba neizvršljiva. Postavlja se vprašanje, ali je takšno ravnanje v nasprotju (*ultra petitum* ali

40 Landolt, P.: Practical Aspects of Arbitrating EC Competition Law, Schultess, Zürich. 2007, str. 1-3.

41 ICC primer št. 8626, citiran v ICC zbirki arbitražnih odločb št. 2/2003, str. 55-59.

42 Odločba švicarskega Vrhovnega sodišča v zadevi *G.S.A. proti V.S.p.a.*, DFT 118 II 193 cons. 5c bb.

43 Landolt, P.: Modernised EC Competition Law in International Arbitration, Kluwer Law International, Haag. 2006, str. 105-111.

44 Gospodinov, P. P.: The Application of European Competition Law in Arbitration Proceedings, Erasmus University of Rotterdam, Rotterdam. 2014, str. 70-72.

extra petitum) z mandatom arbitražnega senata, zlasti če nobena izmed strank ne izpostavlja konkurenčnopravnih vidikov spora oziroma kogentno konkurenčno pravo, ki ga uporabijo arbitri, ni enako kot *lex contractus*.

Avtonomija strank je temeljno vodilo arbitražnega postopka, arbitri pa z izbiro konkurenčnih pravil drugega pravnega reda (kot *lex contractus*) zavestno odstopajo od svobodne in jasno izražene volje strank. Arbitri z *ex officio* obravnavo konkurenčnih vprašanj tvegajo, da bodo ravnali v nasprotju s pooblastilom za odločanje, kar potencialno predstavlja razlog za odklonitev izvršitve arbitražne odločbe po 1(c) odstavku 5. člena Newyorške konvencije. Po drugi strani arbitri z ne obravnavo konkurenčnih vprašanj tvegajo, da bo odločba, obremenjena s kršitvami konkurenčnega prava, posledično v nasprotju z javnim redom in prav tako neizvršljiva.[45]

Pravna teorija je razvila dvostopni kriterij, ki naj bi arbitrom dopuščal *ex officio* obravnavo konkurenčnopravnih problemov. Prvič, arbitri se morajo omejiti na trditveno podlago oziroma navedbe strank in ne smejo sami zbirati procesnega gradiva. Tako arbitri denimo ne bodo smeli samostojno raziskovati tržnih razmer na posameznem upoštevnem trgu in po uradni dolžnosti ugotavljati tržnih pogojev, če za to ni podlage v navedbah strank. Drugič, arbitri se morajo omejiti na postavljene zahtevke strank in stranki ne smejo prisoditi več ali kaj drugega, kot je zahtevala (*ne eat arbiter ultra et extra petita partium*). Z drugimi besedami, arbitri ne smejo prestopiti pooblastila za odločanje, ki ga začrtajo stranke postopka.[46]

Opisano pravilo je mogoče prikazati z naslednjima hipotetičnima primeroma. V prvem primeru med strankama licenčne pogodbe nastane spor o plačilu licenčnine. Jemalec licence zatrjuje, da licenčnina ni zapadla v plačilo, saj licenčna pogodba ni bila nikoli veljavno sklenjena. Arbitražni senat bo v tem primeru moral odločiti o veljavnosti pogodbe in bo zato lahko tudi po uradni dolžnosti presojal, ali je pogodba skladna s pravili konkurenčnega prava. Uporaba konkurenčnih pravil bo v tem primeru znotraj postavljenega zahtevka (oziroma ugovora) ene izmed strank – tj. da pogodba ni bila nikoli veljavno sklenjena.[47]

V drugem primeru med strankama licenčne pogodbe nastane spor zgolj o višini plačila licenčnine, pri čemer nobena stranka ne uveljavlja neveljavnosti pogodbe. Spor, ki se nanaša na samo višino zahtevanega plačila, neogibno temelji na predpostavki, da je pogodbeno razmerje veljavno. Arbitražni senat bo v takem primeru moral odločiti o višini pogodbenega plačila, zato brez ustreznega zahtevka strank ne bo smel odločati o veljavnosti pogodbe. Arbitri bi z uporabo konkurenčnih norm v takem primeru ravnali *ultra petitum* in odločili mimo postavljenega zahtevka – tj. da arbitražni senat odloči o višini (in ne veljavnosti pogodbe).[48]

Za odločitev v nasprotju s postavljenim mandatom bi prav tako šlo, če bi stranke arbitrom izrecno naročile, naj pri odločanju ne uporabijo konkurenčnega prava, a bi ti vseeno obravnavali konkurenčne probleme.[49] Arbitri lahko skladno z doktrino, ki jo je SEU razvilo v zadevi *Treuhand*[50], osebno odgovarjajo za kršitve konkurenčnega prava, če zavestno ignorirajo konkurenčnopravne probleme, zlasti obstoj morebitnih nedovoljenih kartelnih dogovorov.[51] V takih primerih je zato priporočljivo, da arbitri že pred začetkom postopka odklonijo mandat za odločanje in se izognejo situaciji, ko bi jih ravnanje v skladu z voljo strank izpostavilo lastni konkurenčnopravni odgovornosti.

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Nekateri komentatorji – ob odsotnosti jasnih pravil, ki bi arbitrom nalagala *ex officio* uporabo konkurenčnega prava – podlago za uporabo konkurenčnih norm iščejo v kolizijskih določbah, ki so sicer namenjene državnim sodiščem in pod določenimi pogoji nalagajo uporabo kogentnih določb tretjih držav.[52] Ob tem se

45 Flere, P., Impact of EC Competition Law on Arbitration Proceedings, v: Slovenian Law Review, št. 1/2006, str. 162-164.

46 Nazzini, R., Concurrent proceedings in Competition Law, Procedure; Evidence and Remedies, Oxford University Press, Oxford. 2004, str. 343.

47 Flere, P., Impact of EC Competition Law on Arbitration Proceedings, v: Slovenian Law Review, št. 1/2006, str. 164.

48 Derains, Y.: Specific Issues Arising in Enforcement of EC Antitrust Rules by Arbitration Courts, v: European Competition Law Annual 2001, Effective Private Enforcement of EC Antitrust Law (ur. Ehlermann C.D. in Atanasiu I.), Hart Publishing, Oxford/Portland Oregon. 2003, str. 164.

49 Radicati Di Brozolo, G. L.: Arbitration and Competition Law: The Position of the Courts and of Arbitrators, v: Arbitration International, št. 1/2011, str. 22.

50 Sodba SEU v zadevi *AC-Treuhand AG proti Komisiji,* T-99/04*,* 8. julij 2008.

51 Komninos, A.: nav. delo, str. 34.

52 Landolt, P.: Modernised EC Competition Law in International Arbitration, Kluwer Law International, Haag. 2006, str. 120-129.

največkrat navaja 3. odstavek 9. člena Uredbe Rim I[53], ki predvideva, da se lahko kogentnim normam tretjih držav, v katerih so obveznosti bile ali bi morale biti izpolnjene, prizna učinek, kolikor te kogentne norme izpolnitev pogodbe opredeljujejo kot nezakonito. Smiselno enako določbo vsebuje 19. člen švicarskega Zakona o mednarodnem zasebnem pravu[54], ki določa, da morajo švicarska sodišča upoštevati tuje kogentne norme, če to narekujejo interesi strank in obstaja tesna zveza med dejstvi primera in tujim pravnim sistemom. Dodatno, 137. člen švicarskega Zakona o mednarodnem zasebnem pravu predvideva, da lahko sodišče pri odločanju o odškodninskem zahtevku, ki zadeva proti konkurenčne učinke na trgu tretje države, uporabi konkurenčne norme te tretje države.[55] Čeprav tovrstne norme za arbitre niso neposredno zavezujoče, naj bi temeljile na splošno priznanih pravnih načelih in naj bi kot takšne predstavljale primerno vodilo za uporabo konkurenčnega prava po uradni dolžnosti.[56]

Ne glede na pravno podlago, na katero bodo arbitri v vsakem posameznem primeru oprli uporabo kogentnih norm konkurenčnega prava, vse od zadeve *Eco Swiss* dalje velja, da arbitraža ne more in ne sme ignorirati konkurenčnopravnih problemov. Zato se zdi pravilneje, da arbitri v dvomu vselej po uradni dolžnosti obravnavajo konkurenčne vidike predstavljenega spora, četudi po uradni dolžnosti. Drži, da sta avtonomija in neodvisnost temeljni vidik arbitraže, vendar ta ne obstaja v pravnem vakuumu. Odločitev v zadevi *Eco Swiss*, ki jo je sprejelo SEU, kot najvišji oblastni organ za razlago prava EU, je zato treba že samo po sebi upoštevati kot zadosten temelj, ki nalaga *ex officio* uporabo konkurenčnega prava. Subjekti mednarodne trgovine bodo zato morali sprejeti, da so norme konkurenčnega prava EU zdaj povzdignjene na raven *lex mercatoria*, ki ga bodo arbitri presojali ne glede na morebitno drugo pravo, ki so ga stranke dogovorile za presojo spora.

Sodna in arbitražna praksa sta sčasoma razvili spoznanje, da so lahko interesi konkurenčne politike zavarovani, četudi sodišča presojajo samo najhujše kršitve konkurenčnega prava. Minimalističen pristop se tudi z vidika splošne koncepcije javnega reda zdi edini logičen in pravilen. Pridržek javnega reda je skrajno sredstvo, ki naj se uporabi čim redkeje. Sodišče, ki odloča o izvršljivosti oziroma razveljavitvi arbitražne odločbe, mora pri tem ravnati z zavedanjem, da je javni red ožja kategorija kot kogentne norme

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Kot opisano zgoraj, sodišča lahko zaradi kršitve kogentnih norm konkurenčnega prava odklonijo izvršitev ali ugodijo tožbi na razveljavitev arbitražne odločbe. Pri tem se postavlja vprašanje, če že vsaka kršitev konkurenčnega prava obenem krši javni red. Povedano drugače, ali lahko sodišče arbitražno odločbo razveljavi že ob najmanjši kršitvi konkurenčnega prava ali mora biti ta posebej kvalificirana.

Pravna teorija je razvila dva pogleda na omenjeni problem. Maksimalističen pristop daje prednost učinkoviti konkurenčni politiki in izhaja iz premise, da lahko sodišče presoja vse pravne in dejanske vidike arbitražne odločbe. Sodišče, ki odloča o razveljavitvi ali izvršitvi arbitražne odločbe tako dejansko nastopa kot pritožbena instanca arbitražnemu tribunalu. Minimalističen pristop daje prednost učinkovitosti arbitražnega postopka in temelji na ideji, da bi pretirana presoja s strani sodišča izvotlila namen arbitraže – ekonomičnost in hitrost postopka. Sodišče, ki odloča o zakonitosti arbitražne odločbe, naj pri tem upošteva samo najbolj flagrantne in najbolj očitne kršitve konkurenčnih norm. Skratka, sodišče naj služi kot korektiv, ki skrbi, da so sanirane najbolj hude kršitve kogentnih norm in ne kot arbitražni tribunal druge stopnje.[57]

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53 Uredba (ES) št. 593/2008 Evropskega parlamenta in Sveta z dne 17. junija 2008 o pravu, ki se uporablja za pogodbena obligacijska razmerja (UL L 177 z dne 4. julija 2008).

54 Švicarski zakon o mednarodnem zasebnem pravu (*Bundesgesetz über das Internationale Privatrecht*) z dne 18. decembra 1987 (IPRG; SR 291).

55 Komninos, A.: nav. delo, str. 45-46.

56 Landolt, P.: Modernised EC Competition Law in International Arbitration, Kluwer Law International, Haag. 2006, str. 128.

57 Radicati Di Brozolo, G. L.: Arbitration and Competition Law: The Position of the Courts and of Arbitrators, v: Arbitration International, št. 1/2011, str. 4.

58 Kramberger Škerl, J.: Javni red pri priznanju in izvršitvi tujih sodnih odločb (s poudarkom na procesnih vprašanjih), v: Zbornik znanstvenih razprav, let. LXV (2005), str. 254.

59 Kramberger Škerl, J.: Javni red pri priznanju in izvršitvi tujih sodnih odločb (s poudarkom na procesnih vprašanjih), v: Zbornik znanstvenih razprav, let. LXV (2005), str. 255. Tako tudi Radicati Di Brozolo, G. L.: Arbitration and Competition Law: The Position of the Courts and of Arbitrators, v: Arbitration International, št. 1/2011, str. 7.

relevantne konkurenčnopravne norme ter obravnavali ustrezne konkurenčnopravne probleme, ne da pri tem opravi obširno meritorno presojo spora, ki je bil razrešen z arbitražno odločbo.[60] Če kršitev konkurenčnega prava ni že *prima facie* razvidna iz arbitražne odločbe, sodišče nima razloga, da bi takšno odločbo razveljavilo zaradi ugovora javnega reda.

Navedenemu stališču so v zadnjem času večinsko sledila tudi ameriška in evropska sodišča.[61] Iz ameriške sodne prakse velja izpostaviti zadevo *Baxter International*[62], v kateri je sodišče odločilo, da imajo arbitri sicer dolžnost, da konkurenčne probleme obravnavajo, vendar stranke ne morejo zahtevati razveljavitve arbitražne odločbe, če arbitri napačno razlagajo konkurenčne norme. Povedano drugače, kršitev materialnega prava še ni zadosten razlog za razveljavitev arbitražne odločbe. Takšno stališče je potrdila tudi francoska praksa v zadevi *Thalès*[63], kjer je sodišče odločilo, da mora biti kršitev javnega reda očitna, dejanska in konkretna (*flagrante, effective et concrète*), sicer ne opravičuje razveljavitve arbitražne odločbe.[64] Za grobe kršitve konkurenčnega prava bo denimo šlo, če bodo arbitri spregledali t.im. *hard-core* omejitve konkurence[65], kot so denimo sporazumi o določanju cen, razdelitvi trgov in omejitvi proizvodnje.[66] Prav tako bi šlo za grobe kršitve, če bi arbitri namenoma delovali kot mehanizem za reševanje sporov med udeleženci protipravnega kartela. Za grobe kršitve javnega reda po drugi strani ne bo šlo, če bo arbitražni senat spregledal kršitev konkurenčnega prava, ki je v času odločanja že prenehala. Ker je kršitev že prenehala, morebitna nepopolna odločitev arbitražnega senata nima usodnega učinka na javni red in učinkovito konkurenčno politiko.[67]

Smiselno enako prakso, ki poudarja načelo restriktivne presoje arbitražnih odločb, so sprejela tudi nemška[68], italijanska[69], švedska[70], belgijska[71] in grška sodišča[72].

Uredba št. 1/2003 in arbitraža

Svet Evropske unije je leta 2002 sprejel Uredbo št. 1/2003[73], ki je v veljavo stopila leta 2004 in je tedaj predstavljala celovito reformo konkurenčnega prava EU. Omenjena uredba predstavlja enega izmed najpomembnejših zakonodajnih aktov s področja konkurence, saj ureja uporabo pravil 101. (prepoved nedovoljenih sporazumov) in 102. člena (prepoved zlorabe prevladujočega položaja) PDEU. Za razliko od prejšnje Uredbe št. 17[74], ki je bila sprejeta leta 1962 in je v osrčje konkurenčnega sistema EU postavljala Komisijo, Uredba št. 1/2003 uvaja decentralizirani sistem izvrševanja konkurenčne politike, ki večjo vlogo priznava nacionalnim konkurenčnim oblastem in nacionalnim sodiščem.[75] Slednja so po novem med drugim upravičena, da v celoti in neposredno uporabijo 101. in 102. člen PDEU, s čimer je odpravljen prejšnji *ex ante* sistem nadzora izjem od sklepanja nedovoljenih sporazumov.

Da bi se kljub decentraliziranem sistemu ohranila enotna uporaba konkurenčnega prava EU, Uredba št. 1/2003 v 15. in 16. členu predvideva več oblik sodelovanja Komisije, nacionalnih regulatorjev in sodišč.[76]

Če kršitev konkurenčnega prava ni že *prima facie* razvidna iz arbitražne odločbe, sodišče nima razloga, da bi takšno odločbo razveljavilo zaradi ugovora javnega reda

60 Radicati Di Brozolo, G. L.: Arbitration and Competition Law: The Position of the Courts and of Arbitrators, v: Arbitration International, št. 1/2011, str. 5.

61 Williamson, B. M.: Recent Developments: *Baxter International, Inc. v. Abbot Laboratories,* v: Ohio State Journal on Dispute Resolution, št. 4/2004, str. 1119.

62 Sodba ameriškega pritožbenega sodišča za 7. okrožje v zadevi *Baxter International, Inc. proti Abbot Laboratories,* 315 F.3d 829, 16. januar 2003.

63 Sodba pritožbenega sodišča za Pariz v zadevi *Thalès proti Euromissile*, *Rev. Arb. 271,* 18. november 2004.

64 Gaillard, E.: Extent of Court Review of Public Policy, v: New York Law Journal, št. 65/2007, str. 1-4.

65 Splošno o *hard-core* (nedopustnih) omejitvah konkurence gl. npr. Repas, M.: Konkurenčno pravo v teoriji in praksi – omejevalna ravnanja in nadzor koncentracij, Uradni list RS, Ljubljana. 2010, str. 171 in nasl.

66 Repas, M.: Konkurenčno pravo v teoriji in praksi – omejevalna ravnanja in nadzor koncentracij, Uradni list RS, Ljubljana. 2010, str. 171.

67 Radicati Di Brozolo, G. L.: Arbitration and Competition Law: The Position of the Courts and of Arbitrators, v: Arbitration International, št. 1/2011, str. 14.

68 OLG Thüringen, 8. avgust 2007, SchiedsVZ, 2008, 44.

69 Sodba pritožbenega sodišča za Firence v zadevi *Nuovo Pignone proti Schlumberger*, *Riv. dell' arbitrato 741*, 21. marec 2006.

70 Sodba pritožbenega sodišča za Sveo v zadevi *Republika Latvija proti Latvijas Gaze*, 4. maj 2005.

71 Sodba pritožbenega sodišča za Bruselj v zadevi *Cytec proti SNF*, 22. junij 2009.

72 Sodba pritožbenega sodišča za Thessaloniki, 1207/2007, ki jo je Vrhovno sodišče Grčije potrdilo v sodbi št. 1665/2009.

73 Uredba Sveta (ES) št. 1/2003 z dne 16. decembra 2002 o izvajanju pravil konkurence iz členov 81 in 82 Pogodbe (UL L 1 z dne 4. januarja 2003).

74 Uredba Sveta (ES) št. 17/62: Prva uredba o izvajanju pravil konkurence iz členov 81 in 82 Pogodbe (UL L 13 z dne 21. februarja 1962).

75 Wils, W. P. J.: Ten Years of Regulation 1/2003 – A Retrospective, v: Journal of European Competition Law & Practice, št. 4/2013, str. 293-301.

76 Glej uvodno izjavo št. 21 k Uredbi št. 1/2003: »*Enotnost pri uporabi pravil konkurence zahteva tudi vzpostavitev oblik sodelovanja med sodišči držav članic in Komisijo. To velja za vsa sodišča držav članic, ki uporabljajo člena 101. in 102. Pogodbe, ne glede na to, ali uporabljajo ta pravila v pravnih sporih med zasebnimi strankami ali pa delujejo kot organi, pristojni za konkurenco, oziroma kot pritožbena sodišča. Zlasti morajo nacionalna sodišča imeti možnost, da Komisijo zaprosijo za informacije*

Navedene določbe predstavljalo *lex specialis* v razmerju s splošno dikcijo 3. odstavka 4. člena Pogodbe o Evropski uniji (PEU)[77], ki uzakonja dolžnost lojalnega sodelovanja (*a duty of loyal co-operation*)[78] EU, držav članic in njihovih nacionalnih institucij.[79] Omenjeno načelo države članice zavezuje k sprejemanju potrebnih ukrepov, da zagotovijo izpolnjevanje prevzetih obveznosti, ki izhajajo iz PEU ali so posledica ukrepov EU oziroma k vzdržanju od vseh ukrepov, ki bi lahko ogrozili doseganje ciljev PEU.[80] Mehanizmi sodelovanja so neogibno potrebni predvsem zato, ker v praksi pogosto prihaja do situacij, ko Komisija najprej odloči o kršitvi pravil konkurenčnega prava, šele nato pa se subjekti, ki so bili s proti konkurenčnim ravnanjem oškodovani, odločijo za zasebno uveljavljanje konkurenčnega prava v obliki odškodninskih tožb pred nacionalnimi sodišči.[81]

Glavne oblike sodelovanja, ki jih predvideva Uredba št. 1/2003, so naslednje:

- **Pomoč Komisije nacionalnim sodiščem:** nacionalna sodišča lahko pri uporabi 101. in 102. člena PDEU zaprosijo Komisijo, da jim pošlje informacije, s katerimi razpolaga, ali svoje mnenje o vprašanjih glede uporabe pravil konkurenčnega prava EU[82];

- **Posredovanje sodb držav članic Komisiji:** Države članice so Komisiji dolžne posredovati kopije vseh sodb nacionalnih sodišč o uporabi 101. ali 102. člena PDEU. Posredovati jih morajo takoj, ko je celotna pisna sodba vročena strankam[83];

- **Amicus curiae intervencija Komisije:** Nacionalni konkurenčni organi lahko nacionalnim sodiščem svoje države članice po uradni dolžnosti predložijo pripombe o vprašanjih glede uporabe 101. in 102. člena PDEU. Kadar skladna uporaba 101. ali 102. člena PDEU tako zahteva, lahko tudi Komisija na lastno pobudo pisno predloži svoje opombe (*amicus curiae*) sodiščem držav članic. Tako nacionalni konkurenčni organi kot Komisija lahko svoje pripombe z dovoljenjem naslovnega sodišča posredujejo tudi ustno na obravnavi[84];

- **Vezanost nacionalnih sodišč na odločbe in postopke Komisije:** Kadar nacionalna sodišča odločajo o domnevnih kršitvah 101. in 102. člena PDEU, ki so že predmet odločbe Komisije, ne smejo sprejeti odločitev, ki so v nasprotju z že sprejeto odločbo Komisije. Prav tako se morajo izogibati odločitvam, ki bi nasprotovale odločbi, ki jo namerava sprejeti Komisija v že začetem postopku[85].

Postavlja se vprašanje, ali imajo tudi arbitri pravico ali nemara celo dolžnost tovrstnega sodelovanja s Komisijo in nacionalnimi varuhi konkurence.

Uvodoma je treba izpostaviti, da se arbitraža vse od odločitve SEU v zadevi *Nordsee* ne šteje za sodišče, ki bi lahko postavljajo predhodna vprašanja v postopku po 267. členu PDEU. Iz jezikovne razlage Uredbe št. 1/2003 tako izhaja, da se tam predvideni mehanizmi sodelovanja ne nanašajo na arbitražo

Uvodoma je treba izpostaviti, da se arbitraža vse od odločitve SEU v zadevi *Nordsee*[86] ne šteje za sodišče, ki bi lahko postavljajo predhodna vprašanja v postopku po 267. členu PDEU.[87] Iz jezikovne razlage Uredbe št. 1/2003 tako izhaja, da se tam predvideni mehanizmi sodelovanja ne nanašajo na arbitražo. Dikcija 15. in 16. člena namreč govori zgolj o sodelovanju nacionalnih sodišč; ta pa po ustaljeni praksi SEU ne zajemajo arbitražnih tribunalov. Vsakršen dvom o tem ali Uredba št. 1/2003 zajema arbitražo, je Komisija odpravila z Obvestilom o sodelovanju med Komisijo in sodišči držav članic pri uporabi členov 101. in 102. PDEU (Obvestilo).[88]

ali njeno mnenje v zadevah, ki se tičejo uporabe zakonodaje Skupnosti o konkurenci. Komisija in organi, pristojni za konkurenco v državah članicah, morajo imeti tudi možnost, da predložijo pisne ali ustne ugotovitve sodiščem, ki uporabljajo člena 101. in 102. Pogodbe. Te pripombe je treba predložiti v okviru nacionalnih proceduralnih pravil in ravnanj, vključno s tistimi, ki varujejo pravice strank. Zato je treba sprejeti ukrepe, ki zagotavljajo, da so Komisija in organi, pristojni za konkurenco v državah članicah, stalno dobro obveščeni o postopkih, ki tečejo pred nacionalnimi sodišči.«

77 Pogodba o Evropski uniji (UL C 326 z dne 26. oktober 2012).

78 Vlahek, A.: *Amicus curiae* sodelovanje med slovenskimi sodišči, UVK in Evropsko komisijo v konkurenčnopravnih zadevah, gradivo Inštituta za primerjalno pravo, dostopno na: <http://www.konkurencnopravo.eu/uploads/files/Ana%20Vlahek,%20Sodelovanje%20med%20sodi%C5%A1%C4%8Di,%20UVK%20in%20Evropsko%20komisijo.pdf>, str. 6-7 (16. 5. 2017).

79 Vlahek, A., nav. delo, str. 6-7.

80 Prav tam.

81 Ragazzo, C. in Binder, M.: Antitrust and International Arbitration, v: UC Davis Business Law Journal, št. 1/2015, str. 190-192.

82 1. odstavek 15. člena Uredbe št. 1/2003.

83 2. odstavek 15. člena Uredbe št. 1/2003.

84 3. odstavek 15. člena Uredbe št. 1/2003.

85 16. člen Uredbe št. 1/2003.

86 Sodba SEU v zadevi *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG*, C-102/82, 23. marec 1982.

87 Stylopoulos, E.: Arbitrators: judges or not?, Kluwer Arbitration Blog, dostopno na: <http://kluwerarbitrationblog.com/2009/03/09/arbitrators-judges-or-not-an-ec-approach/> (1. 7. 2017).

88 Obvestilo Komisije o sodelovanju med Komisijo in sodišči držav članic

Obvestilo izrecno izključuje dolžnost sodelovanja z arbitražnimi tribunali, saj pristojnost omejuje zgolj na sodišča, *»ki so pooblaščena, da SEU v skladu s členom 267. PDEU postavijo predhodno vprašanje«*.

Ob ugotovitvi, da Uredba št. 1/2003 in Obvestilo izključujeta formalno kooperacijo Komisije in arbitraže, je treba ugotoviti ali morebiti drugi razlogi narekujejo njuno medsebojno sodelovanje.

Posredovanje sodb

Nobenega dvoma ni, da arbitražni tribunal Komisiji ni dolžan posredovati končnih arbitražnih odločb. Bilo bi v nasprotju z načelom zaupnosti in neodvisnosti arbitraže, če bi se Komisija, ki je subjekt javnega prava, seznanila z vsebino arbitražne odločbe, ki primarno ustvarja *inter partes* pravne učinke. Dikcija 2. odstavka 15. člena sicer določa, da so države in ne sodišča tista, ki so dolžna posredovati kopije pisnih sodb, kar bi lahko nakazovalo zaključek, da v okvir splošne obveznosti države spada posredovanje vseh, tudi arbitražnih, in ne zgolj sodnih odločb. Takšen sklep je treba izključiti že iz praktičnih razlogov. Države nimajo vzpostavljenega mehanizma, ki bi jim omogočal, da nadzirajo, kateri arbitražni postopki so v teku in kdaj je posamezna odločba izdana. V nasprotju z načelom pravne in demokratične države ter smislom arbitraže – kot alternativnim mehanizmom za reševanje sporov – bi bilo, če bi država nadzirala stanje posameznih arbitražnih postopkov in o njihovem rezultatu obveščala druge subjekte in javne institucije.[89] Kljub navedenemu bo potek arbitražnih postopkov, ki vključujejo vprašanja konkurenčnega prava, vsaj posredno izpostavljen nadzoru Komisije. Države bodo slednji namreč dolžne posredovati kopije sodb, ki jih bodo nacionalna sodišča izdala v postopkih za priznanje oziroma razveljavitev arbitražnih odločb. Sodišča navedene postopke v večini jurisdikcij zaključijo z izdajo pisne odločbe, s čimer je vzpostavljena obveznost posredovanja po 2. odstavku 15. člena Uredbe št. 1/2003.[90] Pritožbeno sodišče za Haag je tako denimo Komisiji posredovalo sodbo v zadevi *MDI*, s katero je zavrnilo priznanje tuje arbitražne odločbe, ki je vključevala kršitve pravil konkurence in s tem nasprotovala javnemu redu EU.[91]

Pomoč Komisije

Prima facie ni mogoče najti razlogov, ki bi utemeljevali možnost, da arbitražni tribunal po 1. odstavku 15. člena Uredbe št. 1/2003 Komisijo zaprosi, da mu pošlje mnenje o vprašanjih glede uporabe pravil konkurenčnega prava EU. Stranke se za arbitražo odločijo zaradi očitnih prednosti, ki jih tovrstno reševanje sporov prinaša: zaupnost, ekonomičnost, hitrost in avtonomija postopka, ki je izvzet iz sfere državnih sodišč. Zato bi bilo nesprejemljivo, da arbitražni tribunal v postopek pritegne Komisijo, ki predstavlja organ izvršilne veje oblasti.[92] Sploh, ker stranke z odločitvijo za arbitražo načrtno izključijo pristojnost državnih in naddržavnih organov. Na ta način bi se v prvi vrsti ogrozila zaupnost postopka, poleg tega pa tudi njegova ekonomičnost in hitrost. Čakanje na mnenje Komisije o pravilni uporabi prava lahko pomembno zavleče postopek.[93] Poleg tega so arbitri praviloma priznani strokovnjaki, ki so posebej specializirani za odločanje o konkretnem pravnem problemu, ki je predmet posameznega postopka. Če stranke arbitra izberejo zaradi njegovih posebnih znanj na določenem pravnem področju (*iura novit arbiter*), bi bilo nesprejemljivo, da slednji breme odločanja o pravnem vprašanju prevali na Komisijo in s tem ogrozi zaupnost in avtonomnost postopka. Arbitri naj si zato vselej prizadevajo, da o vprašanjih konkurenčnega prava odločijo brez intervencije Komisije ali nacionalnih organov za varstvo konkurence.

Arbitražni tribunal – brez predhodnega soglasja strank postopka – Komisije tako nikakor ne sme zaprositi za informacije ali mnenje o uporabi prava. Izjemoma, če bi obe stranki arbitražnega postopka s tem soglašali, bi avtonomija strank, kot primarno vodilo postopka, dopuščala, da arbitražni tribunal na Komisijo naslovi vprašanje o dejanskih informacijah ali pravnih vprašanjih. V takšnih primerih bo narava sodelovanja arbitražnega tribunala in Komisije neformalna, saj se niti Uredba št. 1/2003 niti Obvestilo formalno ne

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EU pri uporabi členov 101. in 102. PDEU (UL L 127 z dne 9. april 2016).

89 Komninos, A.: nav. delo, str. 18-37.

90 Prav tam.

91 Sodba pritožbenega sodišča za Haag v zadevi *Marketing Displays International Inc. proti VR Van Raalte Reclame BV,* 04/694 in 04/695, 24. marec 2005.

92 Ragazzo, C. in Binder, M.: Antitrust and International Arbitration, v: UC Davis Business Law Journal, št. 1/2015, str. 190-192.

93 Komninos, A.: nav. delo, str. 28.

raztezata na arbitražo. Komisija se bo zato lahko po lastni diskreciji odločila, ali bo na vprašanje tribunala odgovorila in pri tem ne bo vezana na roke, ki jih predpisuje Obvestilo.[94]

V praksi je znan primer, ko je *ad hoc* arbitražni tribunal poimenovan *Tribunal Arbitral de Barcelona* na Komisijo naslovil vprašanje v zvezi z domnevno zlorabo prevladujočega položaja enega izmed infrastrukturnih podjetij v Španiji. Zanimivo je, da je Tribunal na Komisijo naslovil vprašanje, ali ravnanje omenjenega podjetja predstavlja zlorabo prevladujočega položaja v smislu ustaljene prakse SEU. Mogoče je domnevati, da bi tribunal tovrstno vprašanje naslovil na SEU, če arbitraža ne bi bila izključena iz kroga sodišč, ki lahko postavijo predhodno vprašanje po 267. členu PDEU.[95] Prav v tem se kaže glavna potencialna prednost sodelovanja arbitrov in Komisije. Intervencija Komisije lahko v primeru najzahtevnejših pravnih vprašanj sanira nemožnost arbitražnega tribunala, da na SEU naslovi predhodno vprašanje. Ob tem naj velja, da bo tovrstno sodelovanje *ultima ratio,* ko arbitražni tribunal, sestavljen iz uglednih pravnih strokovnjakov, ne more samostojno ugotoviti pravilne razlage posamezne konkurenčnopravne norme. Tribunal pa vprašanja na Komisijo v nobenem primeru ne bo upravičen nasloviti zgolj na podlagi zahteve ali predloga ene izmed strank postopka, ki mu druga stranka nasprotuje.[96]

Amicus curiae intervencija

Komisiji in nacionalnim organom za varstvo konkurence je treba na načelni ravni odreči vsakršno možnost, da bi samovoljno, po uradni dolžnosti intervenirali v arbitražnem postopku. Kot rečeno, temeljna značilnost arbitraže je prav ta, da stranke namerno izključijo pristojnost državnih sodišč in javnopravnih organov

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Postavlja se vprašanje, če lahko Komisija intervenira v postopkih, kjer vse stranke postopka to izrecno dopustijo. Čeprav je avtonomna volja strank temeljno vodilo arbitražnega postopka, terja pritrdilen odgovor večjo mero previdnosti. Ni si težko predstavljati, da bi stranke, ki bi zavrnile zahtevano intervencijo, izzvale določeno mero sumničavosti Komisije. Zato bodo stranke največkrat, da bi se izognile neželeni pozornosti in drugim invazivnejšim ukrepom (denimo preiskave oziroma t.im. *dawn raids*, ki jih lahko Komisija v sklopu svojih pooblastil izvede na sedežu podjetij)[98], *volens nolens* privolile, da Komisija v postopek vstopi kot *amicus curiae*. Arbitražni tribunal mora zato v teh primerih nastopiti kot nekakšen varuh vseh strank postopka in intervencijo Komisije dopustiti zgolj takrat, ko pravnih vprašanj spora ne bo mogoče rešiti drugače, kot z znanjem in pripombami Komisije.[99]

Vezanost na odločbe in postopke Komisije

Nacionalna sodišča so na podlagi 16. člena Uredbe št. 1/2003 zavezana k enotni uporabi konkurenčnopravnih pravil EU. Nacionalna sodišča v določenih primerih odločajo o zadevah, ki jih je Komisija že rešila, zato v teh primerih ne smejo sprejeti nasprotujoče odločitve. Konkretno, kadar nacionalna sodišča odločajo o kršitvah 101. in 102. člena PDEU ne smejo sprejeti odločitev, ki bi bile v nasprotju s sprejeto odločbo Komisije. Prav tako se morajo izogibati odločitvam, ki bi nasprotovale odločbi, ki jo namerava sprejeti Komisija v že začetem postopku. Nacionalno sodišče mora zato vselej oceniti, če je potrebno, da svoje postopke, do sprejema odločbe Komisije, prekine. Povzeta ureditev je odraz dolžnosti lojalnega sodelovanja in v veliki meri sledi odločitvi SEU v zadevi *Masterfoods*[100]. SEU je v

94 Komninos, A.: nav. delo, str. 18-37.

95 Prav tam.

96 Prav tam.

97 Prav tam.

98 Steene, A.: *Nexans, Deutsche Bahn,* and the ECJ's Refusa to Follow ECHR Case Law on Dawn Raids, v: Journal of European Competition Law & Practice, št. 7/2016, str. 185-187.

99 Komninos, A.: nav. delo, str. 18-37.

100 Sodba SEU v zadevi *Masterfoods Ltd. proti HB Ice Cream Ltd.*,

omenjeni zadevi odločilo, da nacionalna sodišča, kadar odločajo o proti konkurenčnem ravnanju, ki je že predmet odločbe Komisije, ne smejo sprejeti odločitve, ki bi bila v nasprotju z odločbo Komisije.

Arbitražni tribunal je subjekt zasebnega prava in kot tak ni podvržen dolžnosti lojalnega sodelovanja. Prav tako ni dolžnost arbitražnega tribunala, da varuje nacionalni ali supranacionalni javni red, temveč da razreši spor, ki nastane med dvema zasebnopravnima subjektoma. Na načelni ravni zato velja, da arbitri niso vezani na predhodne odločbe Komisije, niti niso dolžni paziti, da bi bila arbitražna odločba v nasprotju z nameravano odločitvijo Komisije.[101] Vendar formalna nevezanost arbitražnega tribunala nima prave praktične vrednosti. Kot opisano zgoraj, pravila konkurenčnega prava se vse od zadeve *Eco Swiss* dalje štejejo za javni red EU. Če bi arbitri sprejeli odločbo, s katero bi ugotovili, da do kršitev konkurenčnega prava ni prišlo, čeprav je Komisija predhodno zaključila drugače, bi s tem neizogibno tvegali, da bo odločba kasneje razveljavljena ali neizvršljiva. Nobenega dvoma ni, da bi stranka, če bi arbitražni tribunal v njeno škodo ugotovil, da pravila konkurence niso bila kršena (pri čemer bi obstoj kršitve jasno izhajal iz odločbe Komisije), zahtevala razveljavitev arbitražne odločbe ali v primeru tuje arbitražne odločbe – zavrnitev priznanja.[102] Arbitražni tribunal tako formalno sicer ni zavezan k upoštevanju odločb Komisije, vendar ga k temu *de facto* sili praksa SEU, ki pravila konkurence šteje za evropski javni red. V nasprotnem primeru arbitri tvegajo, da bodo ravnali v nasprotju s svojo temeljno dolžnostjo in izdali odločbo, ki ni izvršljiva.

Kljub temu, da so arbitri na dejanski ravni dolžni upoštevati odločbe Komisije, bodo morali s posebno preudarnostjo odločati o morebitni prekinitvi postopka zaradi odločbe, ki jo Komisija šele namerava sprejeti. Temeljna dolžnost arbitrov je namreč tudi ta, da spor med strankama razrešijo hitro in brez nepotrebnih odlašanj. Prekinitev postopka zaradi čakanja na odločitev Komisije se posledično odmika od temeljnih načel arbitražnega reševanja sporov. Arbitri si morajo zato prizadevati, da postopka ne prekinejo, temveč da sprejmejo odločitev, ki je po njihovem najboljšem vedenju v skladu s predhodno prakso SEU in Komisije.

C-344/98, 14. december 2000.

101 Komninos, A.: nav. delo, str. 27-28.

102 Prav tam.

Na ta način se lahko izognejo nepotrebnemu odlašanju rešitve spora in obenem zagotovijo, da bo arbitražna odločba v skladu z odločbo, ki jo namerava sprejeti Komisija.[103] V tovrstnih primerih je lahko koristno tudi zgoraj opisano neformalno zaprosilo arbitražnega tribunala, da mu Komisija posreduje svoje mnenje o določenem pravnem vprašanju. Le v izjemnih primerih, ko bo Komisija odločala o pomembnih konkurenčnopravnih vprašanjih, glede katerih ni enotne prakse ali jasnega stališča, lahko arbitri utemeljeno razmislijo o možnosti, da bi postopek prekinili. V vseh drugih primerih morajo dati prednost hitrosti in ekonomičnosti arbitraže.

Arbitraža kot korektivni ukrep v postopkih priglasitve koncentracij

Splošno o korektivnih ukrepih

Podjetja morajo koncentracije[104], ki presegajo kriterije letnega prometa iz 1. člena Uredbe št. 139/2004[105], priglasiti Komisiji. Slednja večino koncentracij razglasi za skladno s pravili konkurence. Odločbe o prepovedi koncentracij so redke, tako pred nacionalnimi konkurenčnimi organi, kot tudi na ravni Komisije.[106] Če za določeno koncentracijo vendarle obstaja dvom o njeni skladnosti s konkurenčnopravnimi normami, lahko udeležena podjetja predlagajo spremembe koncentracije[107] oziroma ponudijo zaveze, ki odpravijo proti konkurenčen sum.[108] Spremembe, ki koncentracijo naredijo skladno s pravili konkurence, se na

103 Komninos, A.: nav. delo, str. 27-28.

104 Glej 1. odstavek 3. člena Uredbe št. 139/2004: »Šteje se, da koncentracija nastane, kadar se trajno spremeni nadzor zaradi naslednjih dejavnikov: (a) združitve dveh ali več predhodno neodvisnih podjetij ali delov podjetij, ali (b) pridobitve neposrednega ali posrednega nadzora enega ali več drugih podjetij ali njihovih delov s strani ene ali več oseb, ki že nadzorujejo vsaj eno podjetje, ali s strani enega ali več podjetij, bodisi z nakupom vrednostnih papirjev ali premoženja bodisi s pogodbo ali kakor koli drugače«.

105 Uredba Sveta (ES) št. 139/2004 z dne 20. januarja 2004 o nadzoru koncentracij podjetij (Uredba ES o združitvah), UL L 24/1 z dne 29. januarja 2004.

106 Repas, M.: Konkurenčno pravo v teoriji in praksi – omejevalna ravnanja in nadzor koncentracij, Uradni list RS, Ljubljana. 2010, str. 427.

107 Uredba št. 139/2004 v 2. odstavku 6. člena in 2. odstavku 8. člena izrecno določa, da lahko Komisija odloča o tem, ali je koncentracija združljiva s skupnim trgom po spremembi, ki jo opravijo stranke pred začetkom postopka ali po njem. Odločba Komisije lahko v ta namen vsebuje pogoje in obveznosti, s katerimi zagotovi, da udeležena podjetja izpolnijo obveznosti, ki jih imajo do Komisije glede tega, da naredijo koncentracijo združljivo s skupnim trgom.

108 Repas, M.: Konkurenčno pravo v teoriji in praksi – omejevalna ravnanja in nadzor koncentracij, Uradni list RS, Ljubljana. 2010, str. 427.

Kljub temu, da so arbitri na dejanski ravni dolžni upoštevati odločbe Komisije, bodo morali s posebno preudarnostjo odločati o morebitni prekinitvi postopka zaradi odločbe, ki jo Komisija šele namerava sprejeti. Temeljna dolžnost arbitrov je namreč tudi ta, da spor med strankama razrešijo hitro in brez nepotrebnih odlašanj. Prekinitev postopka zaradi čakanja na odločitev Komisije se posledično odmika od temeljnih načel arbitražnega reševanja sporov

splošno označujejo kot korektivni ukrepi, saj je njihov cilj odpraviti pomisleke Komisije glede konkurence. Natančneje jih ureja Sporočilo Komisije o korektivnih ukrepih, dopustnih po Uredbi Sveta (ES) št. 139/2004 in Uredbi Komisije (ES) št. 802/2004 (Sporočilo).[109] Sporočilo Komisije določa tri vrste korektivnih ukrepov: (i) odsvojitve (podjetij oziroma dejavnosti podjetij primernemu kupcu), (ii) druge strukturne ukrepe (dostop do ključnih infrastruktur, omrežij, tehnologije, ipd.) in (iii) zaveze v zvezi s prihodnjim delovanjem podjetij v koncentraciji (obljube strank, da se bodo vzdržale določenega ravnanja, denimo zvišanja cen ali združevanja proizvodov).[110]

Da bi zagotovila uresničenje zavez, je Komisija začela sprejemati ukrepe, ki tretjim osebam omogočajo, da same uveljavijo spoštovanje zavez

Tipičen primer takšnih postopkovnih zavez je tudi arbitražno reševanje sporov. Odločba Komisije, s katero odloči o dopustnosti koncentracije, v takšnih primerih vsebuje arbitražno klavzulo, s katero stranke koncentracije privolijo v pristojnost arbitražnega senata ali arbitra posameznika

Komisija odsvojitvene zaveze pojmuje kot najbolj zaželene. V okviru teh, podjetja udeležena v koncentraciji odsvojijo del podjetja ali proizvodne dejavnosti, s čimer pride do vzpostavitve novega konkurenčnega subjekta. Posledično se na trgu pojavi podjetje, ki je nov konkurent strankam priglašene koncentracije.[111] Čeprav so odsvojitve najbolj zaželene, te v praksi ne bodo tudi najbolj primerne. Lahko se zgodi, da ni mogoče najti primernega kupca za poslovno enoto, ki je predmet odsvojitve[112] ali, da specifične okoliščine primera narekujejo sprejem drugih ukrepov, kot so denimo: dostop do infrastrukture in omrežij, ključne tehnologije, skupaj s patenti, znanjem in drugimi pravicami intelektualne lastnine, katerih namen je konkurentom olajšati vstop na trg.[113] Tipičen primer tovrstnih zavez izhaja iz zadeve *Newscorp / Telepiù*[114], v kateri se je ponudnik platform plačljive televizije zavezal, da bo konkurentom omogočil dostop do vseh ključnih elementov omrežja, in sicer (i) dostop do potrebne vsebine – pravic oddajanja; (ii) dostop do tehnične platforme; in (iii) dostop do potrebnih tehničnih storitev.

Arbitraža kot korektivni ukrep

Implementacija zavez o dostopu do ključnih infrastruktur in pravic intelektualne lastnine je pogosto zapletena. Povezana je namreč s sklepanjem pogodbenih razmerij s potencialnimi konkurenti, ki predstavljajo vnaprej nedoločen krog tretjih oseb. Izvajanje teh zavez je po svoji naravi zato izrazito decentralizirano. Komisija obenem ne razpolaga z ustreznimi mehanizmi, da bi na operativni ravni sama zagotovila učinkovito izvajanje nadzora nad tovrstnimi zavezami. Da bi zagotovila uresničenje zavez, je Komisija začela sprejemati ukrepe, ki tretjim osebam omogočajo, da same uveljavijo spoštovanje zavez.[115]

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109 Sporočilo Komisije o korektivnih ukrepih, dopustnih po Uredbi Sveta (ES) št. 139/2004 in Uredbi Komisije (ES) št. 802/2004, C 267/1 z dne 22. oktober 2008.

110 Za primer takega korektivnega ukrepa gl. odločbo Komisije v zadevi *ENI/EDP/GDP*, COMP/M.3440, 9. decembra 2004, para. 663 in 719.

111 Repas, M.: Konkurenčno pravo v teoriji in praksi – omejevalna ravnanja in nadzor koncentracij, Uradni list RS, Ljubljana. 2010, str. 430.

112 Tipičen primer je odločba Komisije v zadevi Boeing/McDonnell Douglas, IV/M.877, 30. julij 1997, kjer ni bilo mogoče najti kupca. Podobno tudi odločba Komisije v zadevi zadeva Alcatel/Finmeccanica/Alcatel Alenia Space & Telespazio, COMP/M.3680, 28. april 2005, v kateri odsvojitev ni bila mogoča.

113 Sporočilo Komisije, točka 62. in nasl. Gre za t.im. korektivne ukrepe oziroma zaveze v obliki dostopa.

114 Odločba Komisije v zadevi *Newscorp / Telepiù*, COMP/M.2876, 2. april 2003.

115 Sporočilo Komisije, točka 66.

116 Arbitražne klavzule, ki jih je Komisija prvotno vključevala v zaveze so bile slabo sestavljene in v nekaterih primerih celo patološke. Zdaj so ustrezno sestavljene in omogočajo normalen začetek in potek arbitražnih postopkov. Splošno o patoloških (defektnih) klavzulah gl. npr. Lahne, N.: Ugotavljanje prave volje strank v patološkem arbitražnem sporazumu, v: Slovenska arbitražna praksa, št. 1/2012, str. 44-45.

117 Radicati Di Brozolo, G. L.: EU Merger Control Commitments and Arbitration: Reti Televisive Italiane v. Sky Italia, v: Arbitration International, št. 2/2013, str. 225.

118 Radicati Di Brozolo, G. L.: EU Merger Control Commitments and Arbitration: Reti Televisive Italiane v. Sky Italia, v: Arbitration International, št. 2/2013, str. 227.

sporazumov, kjer lahko arbitražo sprožijo vsi potencialni investitorji.[119]

Arbitražna klavzula, ki jo Komisija sprejme v zaveze, navadno predvideva, da bo arbitražni postopek potekal pospešeno.[120] Odprava proti konkurenčnih učinkov je temeljni namen zavez dostopa, zato je prav, da se tudi arbitražno uveljavljanje omenjenih zavez zagotovi v najkrajšem možnem času. Dodatna značilnost arbitraže v postopku priglasitve koncentracij je ta, da lahko tretje osebe uresničitev zavez uveljavljajo tudi v sodnem postopku. Dejstvo, da stranke koncentracije privolijo v arbitražo v razmerju do tretjih oseb, ne izključi sodne pristojnosti. Te se lahko odločijo, da bodo svoje pravice zaščitile bodisi v sodnem bodisi v arbitražnem postopku. Na ta način se arbitraža v postopku priglasitve koncentracij razlikuje od klasičnega pomena arbitraže, kjer stranke vnaprej izključijo pristojnost državnih sodišč za odločanje v sporu.[121] Ob tem velja, da Komisija, tudi po vključitvi arbitražne klavzule v korektivne ukrepe, ohranja pristojnost nadzora nad izvajanjem zavez in lahko v koncentraciji udeleženim podjetjem naloži denarno globo ali celo odloči, da morajo prenehati z izvajanjem koncentracije, če bi ugotovila, da niso izpolnila danih zavez.[122] Vendar ugotovitev arbitrov, da podjetja niso ravnala skladno z danimi zavezami, Komisije še ne bo opravičevala, da izreče sankcijo zaradi kršitve zavez. Nasprotno, Komisija bo morala opraviti lastno preiskavo, v kateri bo morala z zadostno stopnjo verjetnosti ugotoviti, ali so zaveze kršene ali ne.[123]

Praksa Komisije

Za lažje razumevanje predstavljenega instituta velja omeniti zaveze v zadevi *Dow Chemical / Union Carbide*.[124] Udeležena podjetja so se zavezala, da bodo svojo tehnologijo, licence in druge pravice intelektualne lastnine zagotovile tretjim osebam. Zaveze predvidevajo, da lahko tretje osebe, če podjetja udeležena v koncentraciji omenjenih pravic ne bi zagotovila, sprožijo arbitražni postopek po pravilih Arbitražnega inštituta Nizozemske. Arbitražna klavzula predvideva t.im. nihajno arbitražo (*pendulum arbitration*), kjer obe stranki predlagata svojo rešitev, arbitražni senat pa izbere eno izmed predlaganih rešitev. Arbitražna klavzula izčrpno predpisuje tudi način imenovanja arbitrov ter da bo postopek potekal v angleščini, s sedežem arbitraže v Amsterdamu, na Nizozemskem.[125]

Podobne zaveze med drugim izhajajo iz zadev *BP/E.ON*[126], *Telia/Sonera*[127], *GE/Instrumentarium*[128] in *Alcan/Pechiney II*[129]. Skupna značilnost omenjenih primerov je, da zaveze vnaprej določajo sedež arbitraže, arbitražna pravila, ki naj se uporabijo ob morebitnem sporu, število in postopek imenovanja arbitrov, ter večino, ki je potrebna za sprejem arbitražne odločbe.

Pravna narava arbitraže – korektivnega ukrepa

Nekateri pravni komentatorji so mnenja, da predstavlja arbitraža – kot korektivni ukrep v postopku priglasitve koncentracij – nekakšno *sui generis* regulatorno ali celo supranacionalno arbitražo.[130] Kljub temu gre slediti delu pravne teorije, ki tovrstno arbitražo pojmuje

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119 Splošno o bilateralnih investicijskih sporazumih gl. npr. Menard, M. in Božičko, P., Zaščita tujih naložb v Sloveniji in slovenskih naložb v tujini na podlagi meddržavnih bilateralnih investicijskih sporazumov, v: Slovenska arbitražna praksa, št. 1/2013, str. 4-12.

120 Dempegiotis, S.: EC competition law and international commercial arbitration: A new era in the interplay of these legal orders and a new challenge for the European Commission, v: Global Antitrust Review, št. 1/2008, str. 147.

121 Radicati Di Brozolo, G. L.: EU Merger Control Commitments and Arbitration: Reti Televisive Italiane v. Sky Italia, v: Arbitration International, št. 2/2013, str. 230.

122 Primerjaj 2. in 3(b) odstavek 6. člena ter 4(b) odstavek 8. člena Uredbe št. 139/2004.

123 Gavra, R.: Arbitration In The Context of EU Merger Control and Its Interface with Brussels I Regulation: A New Era For Arbitration In The EU Arena?, v: Global Antitrust Review, št. 3/2010, str. 84-86.

124 Odločba Komisije v zadevi *Dow Chemical/Union Carbide*, COMP/M.1671, 3. maj 2000.

125 Besedilo arbitražne klavzule v angleškem izvirniku, odločitev o zavezah, točka 28: »*If either DOW or a licensee determines that no agreement can be reached on the terms of the license, either party shall be free to move to resolve such disagreement by arbitration. The Rules of Arbitration of the Netherlands Arbitration Institute shall apply to such arbitration, to the extent they are not in conflict with the provision of this para. 28. Each party shall submit a single proposal for the terms of the license to an arbitration panel. The arbitration panel will consist of three individuals, one arbitrator selected by each of the parties, and the chair selected jointly by these two arbitrators. The arbitration panel must select one of the two submitted proposals in its entirety. This selection must be made by majority decision or, if there is no majority, by the chair alone.*«

126 Odločba Komisije v zadevi *BP/E.ON*, COMP/M.2533, 20. december 2001.

127 Odločba Komisije v zadevi *Telia/Sonera*, COMP/M.2803, 10. julij 2002.

128 Odločba Komisije v zadevi *GE/Instrumentarium*, COMP/M.3083, 2. september 2003.

129 Odločba Komisije v zadevi *Alcan/Pechiney (II)*, COMP/M.3225, 29. september 2003.

130 Gl. npr. Blanke, G.: The Case for Supranational Arbitration – Ideas and Prospects, v: European Business Law Review, št. 1/2008, str. 17-41.

kot povsem tradicionalno gospodarsko arbitražo.[131] Razlogov za to je več. Arbitri, ki v arbitražnem postopku odločajo o izpolnjevanju zavez, odločajo o sporu med dvema zasebnopravnima subjektoma – v koncentraciji udeleženega podjetja in njegovega konkurenta oziroma kupca. Tudi predmet spora je zasebnopravne narave – obveznost v koncentraciji udeleženega podjetja, da konkurentu oziroma kupcu zagotovi dostop do ključnih infrastruktur oziroma drugih pravic. Arbitri prav tako ohranjajo avtonomnost in niso pravno vezani na mnenja ali stališča Komisije. Če zaveze ali dogovor arbitražnih strank tega izrecno ne predvidevajo, *amicus curiae* intervencija Komisije ni dopustna. Iz javno dostopnih podatkov izhaja, da Komisija v praksi spoštuje avtonomnost tovrstnih arbitraž in ne posega v njihovo delovanje.[132]

Komisija nadalje nima možnosti, da bi posegla v dokončno arbitražno odločbo, ki ima med strankama učinek *res iudicata*. Če upravičenec iz zavez ne bo zadovoljen z vsebino arbitražne odločbe, bo njeno razveljavitev lahko zahteval pred rednimi sodišči, kot to velja za vse druge arbitražne odločbe, ne more pa njene spremembe zahtevati od Komisije.[133] Upravičenec bo v postopku za razveljavitev arbitražne odločbe moral dokazati, da je ta v nasprotju z zavezami, danimi Komisiji in posledično v nasprotju s konkurenčnim pravom EU, kot posebno kategorijo evropskega javnega reda. Komisija ob tem ohranja možnost, da podjetja udeležena v koncentraciji sankcionira skladno z določili Uredbe št. 139/2004, vendar gre pri tem (zgolj) za administrativno sankcijo, ki ne posega v formalno dokončnost arbitražne odločbe.[134]

Iz zgoraj navedenega izhaja, da ima arbitraža, ki izhaja iz zavez danih Komisiji, vse značilnosti tradicionalne arbitraže. Ne glede na to, ali obravnavani institut pojmujemo kot *sui generis* ali klasično gospodarsko arbitražo, je treba zaključiti, da ima pozitivne učinke tako na nadaljnji razvoj arbitražnega prava kot tudi na zagotavljanje učinkovite konkurence. Komisija z uporabo arbitraže v konkurenčnih postopkih tej priznava vse večjo veljavo in njeno primernost za reševanje sporov na področju konkurenčnega prava. Obenem imajo korist od vključitve arbitraže v zaveze predvsem upravičenci iz zavez – konkurenti in kupci podjetij, ki zaveze ponudijo. Namesto, da bi uresničitev zavez zahtevali v dolgotrajnih sodnih postopkih, lahko svoje pravice veliko hitreje uveljavijo v arbitražnem postopku. Sploh, ker arbitražna klavzula v zavezah navadno določa, da bodo arbitri odločali po pospešenem postopku. Poleg tega so zaveze dostopa pogosto povezane z zapletenimi tehničnimi vprašanji, zato je najprimernejši forum za reševanje teh sporov prav arbitražni senat, sestavljen iz specializiranih strokovnjakov in ne nacionalna sodišča.

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Arbitražna praksa

Prva arbitraža, na podlagi zavez danih Komisiji, je pod okriljem ICC potekala v zadevi *RTI - Reti Televisive Italiane S.P.A. proti Sky Italia S.R.L.*[135] Družba Newscorp se je leta 2003 ob prevzemu italijanskih televizijskih mrež *Telepiù* in *Stream* zavezala, da ne bo pridobila ekskluzivnih pravic za predvajanje »*večjih mednarodnih športnih dogodkov, za katere je pričakovano, da bodo v vodilni vlogi vključevali italijanske ekipe oziroma športnike*« (športne pravice). Del skupine Newscorp je tudi televizijska mreža Sky Italia, ki je pridobila ekskluzivne pravice za predvajanje FIFA svetovnega prvenstva v nogometu leta 2010 (FIFA pravice). Nakup omenjenih pravic je, po mnenju konkurenčne televizije Reti Televisive Italiane, kršil dane zaveze, zato je sprožila arbitražni postopek. Arbitražni senat je – tako kot v klasičnih arbitražnih postopkih – najprej presojal ugovore stranke glede arbitrabilnosti spora ter pristojnosti *ratione personae* in *ratione materiae*.

Potem, ko so arbitri zavrnili očitno neutemeljene ugovore toženca glede arbitrabilnosti in pristojnosti, so se posvetili meritorni presoji spora. Arbitri so poudarili, da FIFA pravice sicer *prima facie* spadajo v jezikovni okvir dikcije športne pravice, vendar navedeno še ne zadošča za ugotovitev, da je Newscorp kršil dane zaveze. Zaveze je po mnenju arbitražnega senata treba razlagati v širšem kontekstu celotne odločitve Komisije, s katero je dopustila predmetno koncentracijo. Iz odločitve Komisije izhaja, da priglašena koncentracija ne vpliva na trg nogometnih dogodkov, ki ne potekajo vsako leto (zlasti evropska in svetovna prvenstva) in

131 Radicati Di Brozolo, G. L.: EU Merger Control Commitments and Arbitration: Reti Televisive Italiane v. Sky Italia, v: Arbitration International, št. 2/2013, str. 225.

132 Marquis, M. in Cisotta, R.: Litigation and Arbitration in EU Competition Law, Edward Elgar Publishing, Northampton. 2015, str. 306-310.

133 Prav tam.

134 Radicati Di Brozolo, G. L.: EU Merger Control Commitments and Arbitration: Reti Televisive Italiane v. Sky Italia, v: Arbitration International, št. 2/2013, str. 230.

135 Odločba št. 16974/FM/GZ, 17. februar 2012.

na tem trgu ne ustvarja učinkov, ki bi vzbujali skrb za učinkovito konkurenco.[136] Ker so bile zaveze sprejete zaradi odprave proti konkurenčnih učinkov na drugih trgih (zlasti nacionalna državna prvenstva ter drugi evropski nogometni pokali, ki potekajo vsako leto), so arbitri zaključili, da FIFA pravic, kljub navideznemu ujemanju, ni mogoče podrediti pojmu športnih pravic in so posledično zavrnili tožnikov zahtevek. Arbitražni senat je nadalje poudaril, da je vezan na zaveze, kot jih sprejme Komisija in zavrnil argument tožnika, da je koncentracija po sprejemu zavez začela učinkovati tudi na trgu nogometnih dogodkov, ki ne potekajo vsako leto. Ob povedanem je treba izpostaviti, da so arbitri odločitev sprejeli brez intervencije in brez morebitnih priporočil ali mnenj Komisije.[137]

Iz predstavljene arbitražne odločbe je mogoče izločiti naslednje bistvene poudarke. Prvič, arbitražni senat je upravičen, da avtonomno razlaga materialnopravno vsebino zavez. Drugič, arbitražni senat ne sme spremeniti dometa zavez – tj. ne sme razširiti zavez na trge, na katerih koncentracija predčasno ni imela vpliva. Tretjič, arbitražni senat je upravičen odločitev sprejeti samostojno, brez intervencije Komisije. Vse navedeno potrjuje, da arbitraža na podlagi zavez predstavlja klasično arbitražo, v kateri arbitri odločajo o zasebnopravnem sporu, medtem ko administrativni prerogativi še naprej ostajajo v rokah Komisije.[138]

Sklep

Arbitraža in konkurenčno pravo sta sprva veljala za nezdružljiva pravna pojma. Po sprejemu odločb v zadevah *Mitsubishi* in *Eco Swiss* je splošno sprejeto, da je zasebno uveljavljanje konkurenčnega prava lahko predmet arbitražnega reševanja sporov.

Arbitražni senat ima v skladu z ustaljeno prakso SEU implicitno dolžnost, da *ex officio* uporabi kogentne norme konkurenčnega prava EU. Arbitri v nasprotnem primeru tvegajo, da bo arbitražna odločba zaradi pridržka javnega reda razveljavljena ali razglašena za neizvršljivo. Ob odsotnosti jasnih kolizijskih norm so arbitri postavljeni pred zahtevno nalogo, da izberejo relevantno konkurenčno pravo. Temeljni kriterij za uporabo prava EU naj bo zato obstoj verjetnosti, da bo arbitražna odločba izvršena v EU. Ker države izvršbe ne bo mogoče vselej predvideti vnaprej, naj arbitri relevantno pravo določijo ob upoštevanju vseh okoliščin primera in na podlagi primerjave več naveznih okoliščin. Čeprav utegne *ex officio* uporaba konkurenčnega prava odstopiti od avtonomije strank, bodo te morale sprejeti, da gre za kogentne norme, uporabe katerih v arbitraži ni več mogoče ignorirati. Tako stranke arbitražnega postopka kot arbitri so lahko izpostavljeni sankciji za proti konkurenčno ravnanje, če namerno spregledajo uporabo konkurenčnega prava.

Kljub težnji Komisije, da zaradi decentralizacije konkurenčnega prava EU zagotovi sodelovanje z državnimi sodišči, je potrebna ugotovitev, da se tovrstno sodelovanje ne razteza na arbitražne tribunale. Slednji ostajajo še naprej v celoti avtonomni pri izvrševanju svojih pooblastil, kar velja tudi za arbitraže, ki izvirajo iz zavez, danih v postopku priglasitve koncentracije.

Razvoj arbitražnega prava je prešel v fazo, ko tudi Komisija to vrsto reševanja sporov priznava kot učinkovit način zagotavljanja učinkovite konkurence. Omenjeno dejstvo ne sme biti niti presenečenje niti naključje. Tako EU kot arbitraža v osnovi služita enakemu cilju – spodbujanju svobodne gospodarske pobude in mednarodne trgovine. Dosedanji razvoj je pokazal, da so bojazni, da bi arbitraža služila kot sredstvo za prikrivanje proti konkurenčnih ravnanj, odveč. Nasprotno, arbitraža lahko služi kot hitrejša in učinkovitejša alternativa sodnemu uveljavljanju kršitev konkurenčnega prava. Iz tega razloga je pričakovati, da bo arbitraža na področju konkurenčnega prava še naprej pridobivala na pomenu, časi, ko so bili konkurenčnopravni spori pojmovani kot nearbitrabilni, pa bodo kmalu postali oddaljena preteklost.

Razvoj arbitražnega prava je prešel v fazo, ko tudi Komisija to vrsto reševanja sporov priznava kot učinkovit način zagotavljanja učinkovite konkurence. Omenjeno dejstvo ne sme biti niti presenečenje niti naključje

136 Odločba Komisije v zadevi *Newscorp / Telepiù*, COMP/M.2876, 2. april 2003.

137 Na predlog strank so v postopku sicer pričali nekateri bivši uradniki Komisije, vendar arbitražni tribunal odločbe ni oprl na njihove izpovedbe.

138 Marquis, M. in Cisotta, R.: Litigation and Arbitration in EU Competition Law, Edward Elgar Publishing, Northampton. 2015, str. 306-310.

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

Case No.: SA 5.6- /2014

Sole Arbitrator:
Address of the Sole Arbitrator:

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

between

Claimant:

and

Respondent:

(the Claimant and the Respondent hereafter jointly referred as: the "**Parties**", each of the Parties individually: a "**Party**")

the Sole Arbitrator under Article 21 and 25 of the Ljubljana Arbitration Rules issues the following

Procedural Order No. 1 and Procedural Timetable

In accordance with the Arbitration Rules of the Ljubljana Arbitration Centre Rules at the Chamber of Commerce and Industry of Slovenia, valid from 1.1.2014 (hereafter: the "**Rules**"), the Sole Arbitrator herby submits to the Parties the Procedural Order and Timetable with respect to the above mentioned Arbitration matter.

I. Rules of the Arbitration Proceedings

1. The Arbitration shall be conducted in accordance with the Rules.

II. Language

1. The Arbitration shall be conducted in the English language.
2. Any communication, document, statements or evidence in any other language shall be presented or submitted in certified translation in the English language, unless not instructed otherwise by the Sole Arbitrator.

III. Seat of Arbitration

1. The place of Arbitration shall be Ljubljana, Slovenia.

IV. Communications

1. All filings and communications among the Parties and the Sole Arbitrator shall be made simultaneously and directly to the Sole Arbitrator and the other party with a copy to be send to Ljubljana Arbitration Centre at the following contact details and addresses:

   a. **With respect to the Claimant:** to the attention of Claimants' representative lawyer

   b. **With respect to the Respondent:**

   c. **With respect to the Sole Arbitrator:**

   d. **With respect to the Ljubljana Arbitration Centre** (hereafter: **"LAC"**): Ljubljana Arbitration Centre at the Chamber of Commerce and Industry of Slovenia, Dimičeva ulica 13, SI-1504 Ljubljana, Slovenia; email: arbitraza.lj@gzs.si

2. Each Party shall immediately inform the other Party, the Sole Arbitrator and the LAC on any change in its contact details. Communications to the aforementioned contact details are deemed to be valid unless any changes to the foregoing are duly notified in advance.
3. The Parties shall not engage *ex parte* in any communication with the Sole Arbitrator relating to the subject matter of the Arbitration.
4. To the extent possible, the Parties shall normally serve any communication by e-mail to the aforementioned e-mail addresses. In such case, any documents shall be attached to e-mail in the PDF file format (whenever possible in the searchable PDF format, otherwise searchable MS Word file format). In addition to the scope of the e-mail, the subject of the email shall contain at least the reference to the Arbitration matter no. "SA 5.6- /2014." (for example, e-mail's subject should read as: "Arbitration Matter No. SA 5.6- /2014; Statement of Claim".

V. Written Submissions

1. Any documents submitted in copies and any signatures on the documents shall be deemed authentic, unless expressly objected by a Party.
2. Statement of Claim and Defence and any further submissions in writing shall contain numbered paragraphs.
3. Statement of Claim and Statement of Defence shall contain all statements, documents and other evidences on which the Claimant and the Respondent rely in support of its claim and defence, respectively.
4. The Sole Arbitrator shall decide on the need of further submissions in writing, in accordance with Article 28 of the Rules.
5. Each submission, if including exhibits, shall include list of any exhibits attached to the submission.
6. Each evidence document submitted by a Party (i.e., evidence in the form of a document) shall be adequately numbered with a mark at the top right corner of the first page of any such document. The numbering shall follow the following manner: abbreviation letter "C" for the Claimant's and "R" for the Respondent's exhibited evidence document and adequate consecutive number of documentary evidence with respect to each of the Parties (for example C1 for the first document of a Claimant submitted as evidence; R2 for the second Respondent's documentary evidence). For the avoidance of doubt, the Loan Agreement no. among and (hereafter: the **"Loan"**) and Cession of Rights Agreement No. dated August 9, 2013 among and (the **"Cession"**), as submitted by the Claimant in its Request for Arbitration are to be numbered and marked as "C1" (for the Loan) and "C2" (for the Cession of Rights Agreement), respectively.
7. The Parties shall avoid duplication of the documents, where the same document has been already submitted in their prior filings.

VI. Hearings and Witness Evidence

1. The Sole Arbitrator shall decide on the need, conduct, manner, transcript of any hearings to be held in the matter.
2. The need, place, manner and form of witness evidence will be decided by the Sole Arbitrator.

VII. Procedural Timetable

1. The Sole Arbitrator submits to the Parties for their consideration the following Procedural Timetable. The column "Event" in the Timetable indicates the sequence of events in the proceedings with respect to the Parties. The column Date in the Procedural Timetable sets forth the time period by which the relevant Party shall make the relevant filing.

Event	Date
Parties' Comments to the Procedural Timetable	September 12, 2014
Sole Arbitrator's Establishment of the Procedural Timetable	September 18, 2014
Claimant's Statement of Claim	October 29, 2014
Respondent's Statement of Defence	December 09, 2014
Other written submissions	To be determined by the sole arbitrator, if needed
Hearings	To be determined by the sole arbitrator, if needed
Arbitral Award	May 22, 2014

2. The Parties shall have a right to provide any comments to the hereby proposed Procedural Timetable by the time set forth in the Procedural Timetable above otherwise it will be deemed that the Parties have agreed to this Procedural Timetable.
3. The Arbitrator will decide on the established Procedural Timetable and inform the parties thereon.
4. It is the right of the Sole Arbitrator to revise the adopted Procedural Timetable at any time to conduct arbitration in cost and time effective manner.

Ljubljana, Slovenia, September 3, 2014

Sent to:
- With respect to the Claimant:

Sent by e-mail to the address:

- With respect to the Respondent:

Sent by courier to the address:

- Ljubljana Arbitration Centre at the e-mail address: arbitraza.lj@gzs.si

Vrhovno sodišče
Gospodarski oddelek

VSRS Sklep Cpg 1/2017

ECLI:SI:VSRS:2017:Cpg.1.2017

Evidenčna številka: VS4003135
Datum odločbe: 17.05.2017
Senat: Vladimir Balažic (preds.), Franc Seljak (poroč.), dr. Mile Dolenc
Področje: ARBITRAŽNO PRAVO - OBLIGACIJSKO PRAVO
Institut: priznanje tuje arbitražne odločbe - javni red - pridržek javnega reda - mednarodni javni red - pravo Republike Belorusije - kogentna določba - pogodbena kazen - denarna obveznost
Zveza: ZArbit člen 42. Konvencija o priznanju in o izvršitvi tujih arbitražnih odločb (Newyorška konvencija) člen 5, 5/2-b. OZ člen 247, 247/3.

Jedro

Določba tretjega odstavka 247. člena OZ je nedvomno kogentna, ni pa (ker ne tehnično ne vsebinsko ne sodi med temeljne določbe zakona) vtkana v mednarodni javni red. Neposredno nasprotovanje določbi tretjega odstavka 247. člena OZ (op. četudi ima v slovenskem pravnem prostoru za posledico ničnost), ne predstavlja imperativne pravne norme oziroma moralnega pravila, zaradi katerega bi bila ogrožena pravna ali moralna integriteta slovenske pravne ureditve.

Med strankama gre namreč za pravno razmerje s tujim elementom, pri čemer sta stranki soglasno dogovorili uporabo tujega prava, kar v njuno pravno razmerje vnaša posledice tujih pravnih sistemov, ki niso nujno (povsem) skladne s slovensko pravno ureditvijo.

Izrek

I. Pritožba nasprotne udeleženke se zavrne in se sklep sodišča prve stopnje potrdi.

II. Nasprotna udeleženka mora v 15 dneh od vročitve tega sklepa predlagateljici povrniti pritožbene stroške v znesku 112,00 EUR z zakonskimi zamudnimi obrestmi, ki tečejo od prvega naslednjega dne po izteku roka za izpolnitev obveznosti, določenega v tej točki izreka, do plačila.

Obrazložitev

1. Okrožno sodišče v Ljubljani (v nadaljevanju sodišče prve stopnje) je s sklepom I R 627/2016 z dne 31. 8. 2016 v celoti ugodilo predlagateljičinemu predlogu za priznanje tuje arbitražne odločbe ter priznalo pravno veljavnost arbitražne odločbe opr. št. 334, ki jo je v postopku med predlagateljico kot tožnico in nasprotno udeleženko kot toženko 19. 1. 2016 izdalo Trgovinsko arbitražno sodišče v Vilini (v nadaljevanju Arbitražno sodišče). Z navedeno arbitražno odločbo je Arbitražno sodišče sprejelo sklep, da potrjuje pogoje poravnave, ki

sta jo tožnica in toženka sklenili 14. 1. 2015, s katero je bilo nasprotni udeleženki naloženo, da je dolžna predlagateljici v treh obrokih plačati 154.494,88 EUR glavnice, stroške arbitražnega postopka ter pogodbeno kazen v višini 100.000,00 EUR; slednjo le pod pogojem, če nasprotna udeleženka ne bi pravočasno in v celoti izpolnila obveznosti plačila glavnice in stroškov postopka.

2. Zoper sklep sodišča prve stopnje je nasprotna udeleženka vložila pritožbo zaradi bistvene kršitve določb postopka in zmotne uporabe materialnega prava. Vrhovnemu sodišču predlaga, da pritožbi ugodi ter izpodbijani sklep spremeni tako, da predlagateljičin predlog za priznanje tuje arbitražne odločbe v celoti zavrne. Podrejeno predlaga, da Vrhovno sodišče pritožbi ugodi, izpodbijani sklep pa razveljavi ter zadevo vrne v ponovno odločanje sodišču prve stopnje.

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

4. Pritožba ni utemeljena.

5. Za priznanje tuje arbitražne odločbe se uporablja določba 42. člena Zakona o arbitraži (v nadaljevanju ZArbit), ki jo je uporabilo tudi sodišče prve stopnje. Ta v drugem odstavku napotuje na uporabo Konvencije o priznanju in o izvršitvi tujih arbitražnih odločb, sprejete 10. junija 1958 v New Yorku (v nadaljevanju newyorške konvencije), ki v V. členu določa razloge, zaradi katerih se zahteva za priznanje in izvršitev arbitražne odločbe lahko zavrne. Kot eden izmed razlogov je določen tudi razlog, na katerega se sklicuje nasprotna udeleženka. Zahteva za priznanje in izvršitev tuje arbitražne odločbe se tako lahko zavrne, če pristojna oblast države, v kateri se zahteva priznanje, ugotovi, da bi bilo priznanje ali izvršitev odločbe v nasprotju z javnim redom te države (točka (b) drugega odstavka V. člena Konvencije).

6. Nasprotna udeleženka, enako kot že prej v odgovoru, odločitvi prvostopenjskega sodišča nasprotuje s sklicevanjem na pridržek javnega reda; meni namreč, da kršitev (kogentne) prepovedi iz tretjega odstavka 247. člena Obligacijskega zakonika (v nadaljevanju OZ) omogoča dvojno sankcioniranje nasprotne udeleženke za primer zamude z izpolnitvijo obveznosti ter tako predstavlja kršitev, ki ruši ustavno načelo enakopravnosti ter sistem obligacijskih razmerij v Republiki Sloveniji. Vendar pa se Vrhovno sodišče v celoti strinja z nosilnimi argumenti sodišča prve stopnje, s katerimi se je to opredelilo do vseh bistvenih navedb nasprotne udeleženke, zato pritožnico napotuje na razloge iz 6., 8. in 9. točke obrazložitve izpodbijanega sklepa. Pridržek javnega reda, na katerega se sklicuje nasprotna udeleženka in ki pride v poštev pri uporabi tujega prava pred domačim sodiščem ter pri priznanju tujih sodnih in arbitražnih odločb ter zaradi katerega nacionalno sodišče priznanje tuje sodne ali arbitražne odločbe zavrne, je bil v izpodbijanem sklepu tolmačen pravilno, saj ta ne vključuje vseh prisilnih določb domačega prava, temveč le tiste imperativne pravne norme in moralna pravila, katerih kršitev bi ogrozila pravno in moralno integriteto slovenske pravne ureditve. S preširoko razlago pojma javni red bi se namreč lahko izjalovilo bistvo instituta priznavanja tujih sodnih (in arbitražnih) odločb, ki je v tem, da stranke ne bodo postavljene pred zahtevo, da bodo morale v sporih z mednarodnim elementom večkrat dokazovati utemeljenost svojih zahtevkov (1). Pridržek javnega reda se mora tako uporabiti samo kot skrajna možnost, in sicer takrat, ko bi njegova neuporaba privedla do posledic, ki bi bile za domač pravni red nevzdržne, pri čemer pa pridržek javnega reda ni namenjen preverjanju pravilnosti odločitve arbitraže (2).

7. Sklep, s katerim je Arbitražno sodišče potrdilo (sedaj) sporni dogovor med strankama postopka, da bo nasprotna udeleženka (tam toženka) za primer izpolnitve z zamudo denarne obveznosti tožnici morala plačati pogodbeno kazen, po oceni Vrhovnega sodišča ne posega v nobeno od temeljnih načel naše države, zato priznanju arbitražne odločbe ne nasprotuje. Določba tretjega odstavka 247. člena OZ je nedvomno kogentna, ni pa (ker ne tehnično ne vsebinsko(3) ne sodi med temeljne določbe zakona) vtkana v mednarodni javni red. Namen pogodbene kazni je kaznovalen: kršitev obligacijskega razmerja ima za posledico civilno sankcijo, kar pa je logična posledica tega, da morajo stranke obligacijskih razmerij svojo obveznost izpolniti (9. člen OZ) ter pri tem spoštovati načelo vestnosti in poštenja (5. člen OZ). Neposredno nasprotovanje določbi tretjega odstavka 247. člena OZ (op. četudi ima v slovenskem pravnem prostoru za posledico ničnost), na katero se sklicuje pritožnica, ne predstavlja imperativne pravne norme oziroma moralnega pravila, zaradi katerega bi

bila ogrožena pravna ali moralna integriteta slovenske pravne ureditve. Pritožnica pa ne more biti uspešna niti s sklicevanjem na ustavno zagotovljeno načelo enakosti pred zakonom, saj takšna kršitev v konkretnem primeru ni podana. Med strankama gre namreč za pravno razmerje s tujim elementom, pri čemer sta stranki soglasno dogovorili uporabo tujega prava, kar v njuno pravno razmerje vnaša posledice tujih pravnih sistemov, ki niso nujno (povsem) skladne s slovensko pravno ureditvijo. Ureditev sankcij za primer zamude z izpolnitvijo obveznosti, kamor spadata tako pogodbena kazen kot tudi zakonske zamudne obresti je stvar materialnega prava in kot taka stvar pravne ureditve države. In ker sta pogodbeni stranki vsebino razmerja vezali na belorusko pravo, je neutemeljeno tudi sklicevanje pritožnice na pravno ureditev zamudnih obresti v našem pravnem redu. Negativna funkcija javnega reda se resda kaže v tem, da se izključuje uporaba tujega prava v primerih, ko bi bila takšna uporaba neprimerna, vendar pa obravnavani primer zaradi zgoraj opisanih učinkov na mednarodni javni red ni tak.

8. Ob ugotovitvi, da nasprotovanje določbi tretjega odstavka 247. člena OZ ne posega v nobeno od temeljnih načel naše države, pa ni mogoče niti mimo dejstva, da je arbitražno sodišče sporni sklep sprejelo na podlagi poravnave, ki sta jo soglasno sklenili pravdni stranki ter na podlagi v pogodbi med strankama dogovorjenega materialnega prava - prava Republike Belorusije (glej točki 3.1 in 3.5 sklepa Arbitražnega sodišča), katerega kogentne določbe (kot izhaja iz arbitražne odločbe) niso bile kršene. Preizkusa, ali je tuj organ tuje pravo uporabil pravilno, delibacijski postopek ne vključuje (pa tudi pritožnica navedb v tej smeri ne podaja), saj sodišče v državi priznanja ne sme prevzeti funkcije inštančnega sodišča; z izjemo, da sme v skladu s splošno sprejetim načelom strogo omejenega preizkusa meritorno pravilnost tuje odločbe in postopek, v katerem je bila izdana, presojati le z vidika skladnosti z javnim redom Republike Slovenije. Vendar pa, kot je bilo pojasnjeno zgoraj, vsaka kršitev kogentnih določb še ne pomeni nujno nasprotovanje javnemu redu države.

9. Neutemeljen je tudi očitek pritožnice, da sklep sodišča nima razlogov o tem, zakaj sodišče v postopku priznanja tuje arbitražne odločbe ni izvedlo naroka, s čimer naj bi bila podana kršitev iz 14. (pa tudi iz 10.) točke drugega odstavka 339. člena ZPP. ZArbit naroka v postopku priznanja tuje arbitražne odločbe ne predvideva, sodišče pa v teh postopkih odloča po pravilih Zakona o nepravdnem postopku (v nadaljevanju ZNP). Ta v prvem odstavku 7. člena določa, da sodišče opravi narok, če je to predpisano z zakonom, ali če oceni, da je to za postopek potrebno. To za konkretni postopek pomeni, da v kolikor je sodišče ocenilo, da narok ni potreben, sodišče postopek izvede na podlagi predloženih listin, svoje odločitve o tem, da je in zakaj je sklep izdalo brez naroka pa v sklepu ni dolžno argumentirati, saj je narok glede na dikcijo zakona predviden kot izjema.

10. Pritožba nasprotne udeleženke je skladno z navedenim neutemeljena, zato jo je Vrhovno sodišče zavrnilo in potrdilo odločitev sodišča prve stopnje.

O stroških postopka

11. Odločitev o stroških pritožbenega postopka temelji na 154. in 165. členu ZPP (v zvezi s 110. členom ZMZPP in 50. členom ZArbit). Nasprotna udeleženka, skladno z načelom uspeha, sama nosi stroške pritožbenega postopka, predlagateljici pa mora povrniti stroške odgovora na pritožbo. Te je Vrhovno sodišče v skladu z veljavno Odvetniško tarifo odmerilo na 112 EUR (200 odvetniških točk za pravno sredstvo oziroma odgovor nanj (tar. št. 23/3) in 22 % DDV). Odločitev o zamudnih obrestih na stroške postopka temelji na načelnem pravnem mnenju Občne seje Vrhovnega sodišča Republike Slovenije (Pravna mnenja I/2006, stran 7, obr.).

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(1) Tako tudi sklep VS RS Cpg 3/2003 z dne 11. 9. 2003.

(2) Primerjaj Ude, Arbitražno pravo. GV Založba, Ljubljana, 2004, str. 252; Galič, Priznanje in izvršitev

domačih in tujih arbitražnih odločb v Sloveniji, ZZR 2013, str. 119-120.

(3) O (zgolj delni) vsebinski povezanosti bi bilo mogoče govoriti le z načelom ekvivalence (8. člen OZ), vendar pa sodna praksa in teorija to načelo rahljata, zlasti iz razlogov kršitve obveznosti strank obligacijskih razmerij, kar se denimo kaže tudi v nekaterih določbah OZ (npr. določbah o ari).

Datum zadnje spremembe: 06.06.2017

Arbitration in Albania

Sokol Elmazaj

Sokol Elmazaj is a lawyer with more than 20 years of broad ranging experience in transactions, litigation and arbitration, across a variety of areas of law in Albania and Kosovo. He is partner in Boga & Associates, a leading Albanian law firm present in two jurisdictions, Albania and Kosovo. Sokol is an arbitrator listed in the roster of ADR Centre of the American Chamber of Commerce in Kosovo. He is also Chairman of the Steering Council of ADR. Sokol is active in the Foreign Investors Association of Albania, which is a business organization that promotes the interests of foreign investors in Albania.

The purpose of this article is to provide a snapshot of the legal framework of domestic arbitration, recognition and enforcement of foreign arbitral awards in Albania.

Domestic Arbitration

Arbitration is not a common means for resolving disputes arising between local businesses in Albania. They continue relying in local courts, which are slow and subject to continuous reforming process.

The sporadic use of arbitration among local businesses could explain the poor legal framework available in Albania for governing domestic arbitration and the lack of offering such services by chambers and/or arbitration institutions in Albania.

The Code of Civil Procedure of the Republic of Albania contained a chapter (art. 400 to art. 438) that was applicable to arbitration taking place in Albania between parties residing in Albania. In order that parties arbitrate their disputes they must have in their written contract a valid arbitration clause or a separate written arbitration agreement. The arbitration clause or agreement is valid if it is in writing and provides for the rules of appointing arbitrator(s). Unless otherwise agreed by the parties (in the arbitration clause or arbitration agreement) the dispute should be resolved within six (6) months from the moment when the arbitral tribunal is duly established. The said term could, upon request of any of the parties or of the arbitral tribunal, be extended by the chairman of the first instance court of law of the district where the arbitration is taking place. The parties may agree to subject the arbitration to the rules of an arbitration institution.

The said provisions of the Code provide also for matters of appointment, challenge or replacement of the arbitrators, jurisdiction of arbitral tribunals, setting aside of the award and enforcement.

Currently, all the above-described chapter of domestic arbitration is repealed and Albania does not have law provisions to govern domestic arbitration. We hope that the Albanian parliament would pass soon the new law on arbitration. This does not mean that, until then, domestic arbitration cannot happen in Albania as the Code of Civil Procedure guarantees enforcement of the domestic arbitral awards. The parties should be careful when drafting the arbitration clause or agreement in order that they are very descriptive. The best would be to refer to rules of arbitration institutions such ICC or other institutions in the neighbour countries. However, due to the lack of specific law provisions, case law and to poor arbitration practice, domestic arbitration in Albania could be very unpredictable.

Arbitration is not a common means for resolving disputes arising between local businesses in Albania

Due to the lack of specific law provisions, case law and to poor arbitration practice, domestic arbitration in Albania could be very unpredictable

International arbitration

In contrast to domestic arbitration uncertainties, Albania offers a well-established practice of recognition and enforcement of foreign arbitral awards.

Since November 2000 (law no. 8688, dated 9 November 2000), the Albanian Parliament has ratified the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958. Before that, specific provisions of the Code of Civil Procedure of the Republic of Albania, which are very similar to those of NY Convention, were applicable for recognition of foreign arbitral awards. These provisions are still applicable for those cases where the legal seat of arbitration is not in a state member of NY Convention.

Despite the almost missing legal framework and undeveloped domestic arbitration, Albania offers a legal environment which is friendly to recognition and enforcement of foreign arbitral awards

In addition to that, on November 2000 (law no. 8687, dated 9 November 2000) the Albanian Parliament ratified the European Convention on International Commercial Arbitration of 1961. The provisions of this Convention are applicable to "[...] *arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States* [...]".

Recognition of the foreign arbitral awards

The recognition of a foreign arbitral award is a procedure that the applicant should initiate by filing an application with the competent Albanian Court of Appeals. The application should have attached the documents listed in Article IV of NY Convention. The Court of Appeals will not make an evaluation of the merits of the case, but the recognition may be refused only for the reasons listed under Article V of NY Convention. Similarly, in case the arbitral award is made in a state which is not member of the NY Convention, the Albanian Court of Appeals would will only examine only whether:

(i) the arbitral tribunal had jurisdiction to resolve the dispute;

(ii) the respondent has been duly notified of the proceedings in case the arbitral tribunal has proceeded in absence of the respondent;

(iii) the same dispute among the same parties has not been judged in Albania;

(iv) the arbitral award is final; and

(v) the arbitral award complies with the basic principles of the Albanian legislation.

The decision of the Court of Appeals can be appealed within thirty (30) days before the Supreme Court. The appeal with the Supreme Court does not stay automatically the enforcement of the arbitral award if recognized by the Court of Appeals decision, unless the Supreme Court orders differently.

Conclusion

In view of all the above, we may conclude that, despite the almost missing legal framework and undeveloped domestic arbitration, Albania offers a legal environment which is friendly to recognition and enforcement of foreign arbitral awards.

LAC representatives on arbitrability of concession disputes, Belgrade, 6 October 2017

The Ljubljana Arbitration Centre

LAC's Secretary General Marko Djinović and senior legal counsel Peter Rižnik spoke on the topic "Arbitrability of Concession Disputes in Slovenia" in Belgrade, 6 October 2017 at the conference marking the 70th Anniversary of the Permanent Arbitration at the Chamber of Commerce and Industry of Serbia.

Their contribution focused on the scope of arbitrability in the Republic of Slovenia in general, and particularly arbitrability of concession disputes with regard to the contested authentic interpretation of Article 40 of the Services of General Economic Interest Act, which was adopted in 2011 and caused significant confusion, particularly to public law bodies (grantors of concession) as parties to arbitration proceedings, as well as dissuading potential domestic and foreign investors (concessionaires). The contribution's added value lies in the analysis of Ljubljana Arbitration Centre's case law and Slovenian judicial case law, established in the last six years concerning the contested authentic interpretation, and which do recognise the arbitrability of concession disputes in a uniform manner.

The overall topic of the conference was "Reshaping the Boundaries of Arbitrability: Are We Heading Forward?"

When:
6-7 October 2017

Where:
Chamber of Commerce and Industry of Serbia, Resavska 13-15, Belgrade, Serbia

Joint UNCITRAL-LAC Conference on Dispute Settlement

20. marec 2018

Stalna arbitraža pri GZS

www.sloarbitration.eu

Vabimo vas

na mednarodno konferenco o reševanju sporov – Joint UNCITRAL-LAC Conference on Dispute Settlement, ki jo organizirata Stalna arbitraža pri GZS in UNCITRAL. Konferenca bo potekala v torek 20. marca 2018 v prostorih Gospodarske zbornice Slovenije.

Letos vas bomo s posebnim veseljem gostili v Ljubljani, saj praznujemo šestdeseto obletnico uporabe Newyorške konvencije o priznanju in izvršitvi tujih arbitražnih odločb in devetdeseto obletnico delovanja Stalne arbitraže pri GZS. Tako imate 150 razlogov za udeležbo.

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

Poudarki konference:

- postopke in najnovejšo prakso uporabe Newyorške konvencije o priznanju in izvršitvi tujih arbitražnih odločb v izbranih državah iz regije;
- vlogo arbitrov pri spoprijemanju s korupcijskimi in drugimi nedovoljenimi praksami strank v mednarodni arbitraži; in
- financiranje stroškov arbitraže s strani tretjih oseb (third party funding in international arbitration).

Dan po konferenci (21. marca 2018) bo potekalo mednarodno arbitražno tekmovanje Ljubljana Willem C. Vis Pre-Moot.

Veselimo se srečanja z vami.

KDAJ: 20. marec 2018

KJE: Gospodarska zbornica Slovenije, Dimičeva 13, Ljubljana, Slovenija

KDO: odvetniki, arbitri, pravniki iz gospodarstva, mednarodno usmerjeni podjetniki in predstavniki državnih institucij

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