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ARBITRABILITY OF THE DISPUTE AS A PRECONDITION FOR THE SUCCESS OF THE ARBITRATION

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Abstract: *Arbitration as an alternative way of resolving disputes is becoming more and more affirmative because the boundaries of the primary are necessarily expanding due to the need for increasingly intensive integrated processes. Not all disputes are similar to arbitration, but only disputes that have the property of arbitrability. Arbitrability is determined in a subjective and objective sense and is a necessary condition for the validity of the arbitration agreement. There is no universal definition of arbitrability, it is defined differently in different countries but also in one country variable over time. The arbitration procedure is limited to a small part of civil disputes, whereby the arbitration changes the litigation procedure in disputes of arbitrable admissibility, while in other civil matters the court bodies retain for themselves exclusive jurisdiction. Each state establishes its own legal rules that determine the limits of admissibility of the arbitral way of resolving disputes, protecting its own interests, which may differ in different countries, most often expressed in the definitions of abitability. The authors analyze the limits of arbitrability as a prerequisite for the success of arbitration, pointing to certain limiting factors in correlation with individual institutions (autonomy of will, public order, conflicting norms).*

Keywords: *arbitrability, arbitration, arbitration procedure, commercial dispute*

INTRODUCTION

The time-based principle of autonomy of will in contract law, which has historically not been so well represented, has created a greater possibility of flexibility and security compared to regular court proceedings. This certainty arises from the right of the parties to the dispute to gain an impression of a fairer outcome of the dispute by participating in the regulation and contracting of their own proceedings. As a result of such aspirations, arbitration emerged as an alternative way of resolving disputes, providing the parties to the dispute with the opportunity to independently decide on the choice of arbitration, ie the choice of an arbitrator who will finally resolve the dispute. The autonomy of the will is not necessarily unlimited, it is limited in its corpus by imperative norms of both national and supranational law, and therefore narrows the possibility of freedom of contract, but is allowed only in relation to those disputes that are arbitrable.

At the very beginning, the authors unequivocally point out that the arbitral way of resolving disputes is not an ideal way either, and that in its conceptual sense it has a number of shortcomings that stand on the opposite position in relation to regular court proceedings. Conceived as an efficient procedure, primarily in terms of speed of dispute resolution but also cost reduction, the consequence is the absence of elementary principles that are established as such in regular court proceedings within national legal systems (privacy, uniformity, cost increase, etc.). This does not result in diminishing the importance of the institute of arbitration, but that future changes are necessary and desirable due to the more pronounced demands of the parties to the dispute, which is a consequence of the development of the global market through greater integration processes and the development of modern information and communication technologies. Hence the need for the rules relating to internal and international arbitration to be unified, due to smaller and smaller differences if we have in mind the internal and supranational market and the space in which economic entities enter into mutual relations. This primarily

results in the unification of conditions for disputes eligible for arbitration, ie the unification of rules relating to the arbitrability of disputes, because the division into domestic and international arbitration is important insofar as it relates to one or more sovereigns in recognizing and enforcing the decision and the possibility that such a decision cannot be recognized and enforced, ie that it is a dispute that is arbitrable in one state and not in another.

As the limits of arbitrability cannot be covered by a single general definition, it is defined differently in different countries, but also in one country it changes over time. This primarily depends on the given legislative framework which regulates the issue of arbitration and the readiness of the state to understand the growing cross-border relations and its interests, whether they are trade or investment arbitration. Therefore, states strive to bring their legislation closer to the concept of consensual nature while respecting and moving the boundaries of public order.

A FEW REMARKS ON ARBITRABILITY

Arbitration way of resolving disputes, as an alternative way, is based on trust and trust. Trust means the transfer of personal authority available to individuals to another person to resolve a specific dispute, while trust is based on trust that characterizes a special relationship between persons who have a dispute and a third party who is entrusted with resolving the dispute. (Vukadinović Marković, 2018) In general, trust and trust can only be expressed in an arbitration agreement and is the highest degree of expression of autonomy of will, which is the essence of an arbitration agreement for disputes that are suitable for arbitration (arbitrable). In the simplest constellation of potential dispute cases, the parties in arbitration see a neutral, reliable and predictable forum that is best suited to resolve any disputes that may arise regarding the validity, enforcement, non-enforcement and consequences of failure to perform the basic dispute. (Jaksic, 2018)

The autonomy of the will is not unlimited, the limits of the autonomy of the will are determined by coercive regulations, public order and good customs in a general way and bind only the subjects of a given relationship, ie it does not produce effect for third parties. However, when it comes to the arbitration agreement and the effect of the arbitral award, the state is particularly interested in protecting the public interest because by allowing the establishment of arbitration, as “private” judicial forums, states renounce part of their sovereignty. In this way, it is possible for certain disputes to be resolved by arbitration, ie depending on the given political, economic, social and other factors, it depends on whether a certain dispute will be suitable for arbitration - arbitrable.

The method of determining the arbitrability of a dispute is not a universal category, but differs in different countries, so it often happens that one dispute is arbitrable in one state and not in another. One of the conditions for arbitrability is that arbitration can be concluded only in the part of property disputes in which the autonomy of the will of the parties is present, while in the part of imperative regulations the arbitration agreement cannot be concluded, but as a rule it is decided by the court. Arbitration is no longer perceived as a tolerated encroachment on the monopoly over the justice of state courts, but as a common method of resolving international trade disputes. This is because arbitration provides the parties with legal protection and security, which is equal to, if not greater than, offered by state courts. (Graslund, 2015)

For an arbitration agreement to be valid, it must meet certain conditions. First of all, an arbitration agreement is a bilateral or multilateral agreement of the parties that, according to national legislation, meet the requirements in the field governing civil matters, with a clear indication in the text of the agreement which parties are concerned. In the agreement itself, it is necessary for the parties to the dispute to clearly indicate the choice of arbitration, ie that the arbitral way of resolving the dispute is the only way and that they will not be able to exercise their right in the dispute in regular court proceedings.

The subject matter of the dispute must be unambiguously determined in the very text of the agreement and in a precise way in order to determine the limits of application. However, in practice, two modalities are possible: determining the subject matter of the dispute that has not arisen and determining the subject matter of the dispute that has yet to arise. It is emphasized that in the first group the dispute should be described in as much detail as possible, and in the second group that the dispute should be defined as broadly as possible. (Poudret & Besson, 2007) When the parties decide to entrust their dispute to arbitration, the institution to which the arbitration is entrusted or the city in which the arbitration is located must be unambiguously indicated, thus determining the nationality of the decision. The written form of the contract is provided in all legislations by the signature of both (or more) contracting parties, whereby the parties can also use modern information and communication technologies when concluding the

arbitration agreement. In addition to the fulfillment of the above conditions, the suitability of the dispute (arbitrability) is an important condition when concluding an arbitration agreement.

ARBITRABILITY OF DISPUTES

The very notion of arbitrability is a complex phenomenon that can have multiple meanings. First of all, arbitrability means a term that determines which disputes are eligible to be the subject of arbitral dispute resolution (arbitrability ratione materiae), ie who can be a party to the arbitral dispute resolution procedure (arbitrability ratione personae). Therefore, we have divided arbitrability into:

- subjective arbitrability and
- objective arbitrability

Both subjective and objective arbitrability are a condition for the validity of the arbitration agreement. When it comes to subjective arbitrability, there is a consensus of the broadest circles that it is determined according to the legislative framework which regulates the matter of civil proceedings and that this property is recognized to individuals and legal entities, but also to states and entities that have the ability to be a party to this procedure. Objective arbitrability determines the scope of arbitration disputes, ie which subjects of the dispute the parties may submit to arbitration for resolution. Given the lack of a single definition of arbitrability, and thus objective arbitrability, we are of the opinion that in practice it is much easier to recognize it than to define it. Arbitrability is a limiting factor of the autonomy of the will to the extent and in the manner provided by the imperative norms of national legislation.

The question of which disputes are a necessary condition for the validity of an arbitration agreement is in part determined by the rules of the UNCITRAL model arbitration agreement relating to commercial arbitration from 1985, which instructs states to determine the limits of arbitrability, ie to exclude disputes that are not subject to arbitral dispute resolution. This Model does not contain a definition or provisions on arbitrability, so it is up to national laws to set criteria for the arbitrability of disputes.

The comparative law practice of individual countries determines abirability taking into account different criteria. The characteristics of claims are most often taken into account, an approach we have previously termed arbitrability ratio materiae. In addition, restrictions on arbitrability are sometimes set taking into account whether the court or administrative body has exclusive jurisdiction over an issue - arbitrability ratione jurisdiction. (Sajko, 2009) If national legislation provides for the exclusive jurisdiction of courts over certain disputes, they are not arbitrable. The same author states that the tendency of certain legal systems (Switzerland, Austria, Germany) is that arbitrability can be extended to all monetary claims, but also to certain intangible claims if the parties are able to conclude a settlement on the disputed issue. This inconsistency, both in terrorism and in the laws of individual countries, when it comes to determining the limit of arbitrability of the dispute, is not in the function of the efficiency of resolving arbitral disputes because it necessarily requires a careful approach to the wording that arbitrary disputes are rights in respect of which the parties may reach a settlement.

The Law on Arbitration of the Republic of Serbia, as well as other laws in comparative law, contains the following approach to determining arbitrability, especially objectively by applying a limiting factor when it comes to autonomy of will:

"Arbitration may be contracted to resolve a property dispute concerning the rights freely available to the parties, except for disputes for which the exclusive jurisdiction of the court is determined."

According to prof. Jelena Vukadinović Marković, when determining arbitrability as a matter of substantive law, the fact that the disputed relationship and the business in which the dispute arose are regulated by dispositive norms should be taken as sufficient, so that such a disputed relationship is considered prima facie arbitrable. (Vukadinović Marković, 2018) The principle thus established by applying the principle of autonomy of will limited the arbitrability of disputes to those that the legislator did not exempt from imperative norms.

This limits the arbitral way of resolving disputes to a smaller part of civil disputes, which arbitrarily changes the litigation procedure in disputes of arbitrary admissibility. In other civil disputes, in non-arbitrable cases, judicial bodies retain for themselves the exclusive jurisdiction when they act in the resolution of a specific dispute by applying coercion, which cannot be applied in the application of arbitration. Therefore, a path was chosen which, on the one hand, imposes a maximally broad general formula close to the concept of universal arbitrability (everything that is dispositive is arbitrable), but on the other hand, in the field of

external arbitrability, leaves conventional limitations that rely largely on analogous application of jurisdictional rules. which applies to the admissibility of the prorogation of jurisdiction to foreign courts. (Uzelac, 2010)

NULLITY OF THE ARBITRATION AGREEMENT

In the theory and practice of certain countries, it is a generally accepted rule that the arbitration agreement itself cannot produce legal effect if there are reasons that make it null and void. The nullity of an arbitration agreement arises, first of all, when it concerns a dispute that is not suitable to be resolved by arbitration, if it is not brought in the legally prescribed form, when the parties did not have the ability to conclude a certain agreement, if the contract was concluded by coercion, threat or force. An arbitration agreement will be null and void if the type of dispute to which it is related is not eligible for arbitration, and so, for example, if it is not a property dispute where the parties have free rights, that agreement will be null and void. (Miljković, 2007).

Disputes arising from status changes of companies are not eligible for arbitration. We will divide the reasons for nullity into substantive and formal, and both can be remediable or irrecoverable. Irrevocable shortcomings would be the non-arbitrability of the agreement, or when the subject matter of the dispute is not determined, if a compromise is reached. As for the shortcomings that can be remedied, there are two types, and the first concerns the determinability of the legal relationship from which the dispute originates. When the objective scope of the arbitration agreement can be determined by interpretation, then its initial shortcoming is remediable. The specificity of the subject of the obligation from the arbitration agreement forms another group of shortcomings. According to the subject of the obligation, the arbitration agreement will be null and void if the case is impossible, indeterminate or impossible to determine. The reason why an arbitration agreement cannot be enforced may be based on an incorrectly determined institutional arbitration. Depending on the error in stating the name of the institution, it will be decided whether the deficiency can be remedied or not. Deficiencies that do not create confusion in the question of whether the parties really wanted to bring the dispute before arbitration and not before the state court, as well as in the question of determining institutional arbitration, can be easily remedied. In addition, problems with misidentification of the seat of a specific institutional arbitration are easily remedied. It is more difficult to remedy a shortcoming if the clause is stated to only indicate possible institutional arbitration.

Determining institutional non-existent arbitration, or which cannot be determined in any way, is an inescapable shortcoming. A much bigger problem, however, is those contractual provisions when arranging an arbitral way of resolving disputes, by contracting two or more arbitral institutions or an arbitral institution of a regular court. As a rule, such clauses should not be problematic if they agree with the principles of arbitration, but the problem arises when one of the parties refuses to apply to the competent court. Ad hoc arbitrations do not have such problems, but it is important to determine the minimum seat of the arbitration.

In general, after a brief presentation on the shortcomings or shortcomings of the arbitration clauses that are a condition for the dispute to be brought before arbitration, we believe that there is an almost invisible line between the shortcomings that can or cannot be eliminated, given the arbitrability as condition for the validity of the arbitration agreement and thus that the dispute can be resolved in this way. When we talk about the formal lack of an arbitration clause, ie that it has not been agreed in any of the possible ways (in writing or orally), it is considered that such an agreement does not exist and cannot be subject to arbitration, but the dispute can only be resolved in regular court proceedings. The situation is different if the arbitration agreement is not made in the legally prescribed written form, by entering the merits of the defendant into the subject matter of the dispute, it is considered that an agreement has been reached between the parties orally. When the defendant enters into a discussion on the merits without highlighting the objection of non-jurisdiction of the arbitration, then only the shortcomings related to the form of the arbitration agreement are eliminated. There is no possibility of convalidating the substantive shortcomings of the arbitration agreement due to the occurrence of the preclusion. In this case, we can imagine that a new arbitration agreement has been concluded between the parties, in an implicit manner.

Destructive contracts, by emphasizing and adopting the reasons of destructibility, do not produce legal effect and thus the impossibility of applying the arbitration clause. The reasons for perishability are mainly contained in the national laws governing obligations. All those whose ultimate goal is to insult the interests of an individual (as opposed to those who insult the public interest) can be cited as reasons, and as such they can become null and void if the conditions

provided for are met. In their legal effect, they are equated with null and void contracts. A request for demolition may be filed by the contracting party whose interest is being harmed, or if one of the contracting parties does not state the reasons for the demolition, convalidation occurs.

The arbitration agreement is the basis of any arbitral settlement of disputes, at the same time a condition for the validity of arbitration, but also the basis for the derogation of regular courts. Just based on a lot of an important arbitration agreement, the jurisdiction of the arbitral tribunal may be established (here, first of all, special consideration should be given to the reasons of invalidity and voidness) so that the character of the arbitral tribunal can be enforced. We can express this as a generally accepted rule that every arbitration is as good as an arbitration agreement. (Petrović, 2013) In this regard, a valid arbitration agreement, among others, the suitability of the dispute to be the subject of arbitration, is a necessary condition for establishing the jurisdiction of arbitration and making an arbitral award that is enforceable. When concluding contracts in practice, the parties to the bona fide often do not pay enough attention to the arbitration clause itself, which ultimately leads to the irrelevance or breakability of the contract. Arbitrability as a condition for the validity of the agreement must exist at the time of concluding the contract.

PUBLIC ORDER AS A FACTOR LIMITING ARBITRABILITY

Public order has already been discussed as a basis that is an obstacle to the arbitrability of the dispute. The right of the parties to choose the applicable law for the substance of the dispute before the international commercial arbitration is limited by the norms of public order of the state where the seat of the arbitration is. When we have in mind international arbitration, a dispute may be unarbitrable in one state, while in another state it may not have such a property, ie it is not covered by a policy that protects public order. Each state establishes its own legal rules that represent public order and which protect its own interests, the basic values on which the order is conceived and those norms are usually contained in the highest legal act of the state, so they are abstract legal rules, a rarer approach is the system of enumeration of general norms. These interests may differ in different countries, which is evident in different definitions of arbitrability. (Dričkova, 2017) Public order is most often used as a basis for limiting the arbitrability of a dispute, and a special problem may arise in the phase of recognition and execution of the arbitral award of a foreign arbitration. The competent State court in the executing State may refuse recognition taking into account the fact that the arbitration dispute is not arbitrable under the national law of the State in which the decision in question is to be recognized and enforced. In this sense, arbitrability, especially when it comes to foreign arbitration, is closely interdependent with public order. Therefore, the contracting parties must provide in advance in the arbitration agreement whether their dispute is arbitrable, both under the law of the domestic state and under the law of the executing state. Therefore, it is especially possible to indicate the problem and establish a mechanism so that when concluding arbitration agreements, the principle of international public order can be established, which would prevent possible abuses by the state in which the decision is to be executed, referring to abstract legal rules of public order decision. Each state is free to establish its own rules of public order and rules of arbitration, provided that they are consistent and do not change in a discriminatory manner on a case-by-case basis. (Bantekas, 2008) Therefore, protecting the already established state and social system, public tax norms are a limiting factor of arbitrability, ie a principle that restricts freedom of contract (autonomy of will), when it comes to private law relations with the element of foreignness in dispute before arbitration. When choosing the right to a dispute to be brought before arbitration, the parties are free to choose the law of a particular state, but also to choose certain non-national rules. Most often, in practice, the parties choose the law of a certain state as authoritative for their contract. (Deskoski, 2016)

APPLICABLE LAW FOR ARBITRABILITY

In general, arbitrability can be defined as the basis on which certain disputes may be eligible for arbitration, ie which are disputes that can be resolved by arbitration and which are exclusively in proceedings before ordinary national courts. Regardless of the fact that these are private institutions, arbitral awards are equated in their effect with the decisions of ordinary courts, ie they produce public law consequences. The distinction between subjective and objective arbitrability, when it comes to a private-legal relationship with the element of insistence, is differently determined in terms of the application of conflict-of-law rules.

When it comes to subjective arbitrability, we first of all have in mind whether the parties to the arbitration agreement had the business capacity to conclude the contract. The provisions on legal capacity to conclude an arbitration agreement are not universally established, but this right to determine capacity is reserved for national legislation. The ability of natural persons is governed by their personal right based on citizenship or domicile, while the conflicting norms for the ability of legal persons are based on the criterion of incorporation or actual seat. (Petrović, 2019) Most modern legal systems, including Serbian legislation, determine that this is the principle of citizenship for natural persons and the principle of actual seat for legal entities. This right also applies to states in the capacity of a contracting party when concluding trade agreements, in those systems where this is allowed, and to be able to negotiate arbitration.

When it comes to objective arbitrability, ie the suitability of the type of dispute that can be the subject of arbitration, modern legal systems determine these rules of arbitration generally broadly covering all disputes of a property nature, with the exception of those over which the state has the exclusive right to adjudicate. The expansion of the arbitrability zone in recent decades has become a trend caused by needs, both nationally and universally, including disputes of a financial or economic nature. However, not all disputes of a property, ie financial and economic nature are arbitrable, disputes for which there is a public interest still remain within the jurisdiction of regular national courts. Such non-arbitrability is mainly derived from the notion of public order, which is differently defined within nation states depending on specific social relations.

The issue of arbitrability can be raised at any stage of the arbitration proceedings, which will ultimately result in a different determination of the arbitration forum. All this indicates that the grounds on which the applicable law can be determined are very broadly set when it comes to disputes that can be resolved by arbitration. Based on this, we consider that the most widely accepted principle is that the dispute in question can be considered arbitrable lex arbitri. Arbitration largely depends on the rules of private international law, more precisely on its conflicting norms, because during the entire arbitration cycle (starting from the arbitration agreement to the procedure of recognition of the arbitration decision) these rules supplement and intertwine with autonomous arbitration rules. In any case, when it comes to arbitration with the element of foreignness, the conflict rules determine which law is applicable and the application of the conflict rule depends on whether and under what conditions the arbitral award will be recognized and enforced in a particular arbitration dispute. Having in mind the application of two basic principles in private international law, the principle of autonomy of will and the principle of the closest connection, the outcome of the arbitration dispute can be predicted, which provides greater security to the parties when concluding an arbitration agreement.

CONCLUSION

Arbitration dispute resolution is becoming an increasingly common way of resolving economic disputes as a consequence of the need for more intensive integration processes. Arbitration, as it has been shown so far in practice, is a faster and simpler process of resolving commercial disputes and at the same time reduces the number of cases and additional pressure on regular courts. By contracting an arbitration clause, the parties in the arbitration see above all a reliable, neutral and predictable judging forum suitable to respond to claims in the event of a dispute. Arbitration is conceived as an efficient procedure characterized by the absence of a number of elementary principles that are established as such in regular criminal proceedings within national legal systems. In order for the arbitration to produce legal effect, it is necessary that certain conditions are met, among others, and that the subject of the arbitration agreement has the property of arbitrability. Arbitrability, most broadly, means a term that determines which disputes are eligible to be subject to arbitration, ie who can be a contracting party when it comes to this way of resolving the dispute (subjective and objective arbitrability). When it comes to both subjective and objective arbitrability, the answer to this question is contained in the normative framework of the nation state. The state itself determines the area of arbitrability and these are mostly property disputes that are not explicitly excluded from the domain of arbitrability. In cases when arbitration with an element of foreignness, special care should be taken when contracting an arbitration clause, especially the institute of the International Private Peacock (public order, conflict rules) and the law to be applied in case of dispute. The fact is that the contracting parties, concluding contracts in good faith and speed required by the market, do not devote enough time to the arbitration agreement, which in certain cases results in non-arbitrability of the dispute as an insurmountable obstacle to arbitration.

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