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Subject: Arbitrability in Serbian Arbitration Law and Practice

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1 Introduction

This report is prepared for the study conducted by the IBA Recognition and Enforcement of Awards Subcommittee on the notion of (non)arbitrability. In this context, this paper analyses the concept of arbitrability in arbitration law and practice of the Republic of Serbia.

In the first place, the report will briefly examine the notion of arbitrability as endorsed in Serbian courts (Section 3). Moving forward, the report will provide an analysis of the applicable law for assessing the (non)arbitrability of a dispute (Section 4). It will further explore the substantive content of arbitrability in statutes and case law alike (Section 5). Lastly, the report will showcase a tabular overview of cases wherein Serbian courts deliberated on this issue.

2 Executive Summary

Serbian case law deals with the issue of arbitrability mostly by relying solely on national law. Unlike in legal doctrine, the term "arbitrability" is normally understood in domestic practice as the objective notion, while the subjective notion is subsumed under the general concept of capacity.

The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards ("**NYC**") with its specific wording appears not to have been the object of debate. On the other hand, the Serbian Arbitration Act (2006) ("**SAA**") sets the general standard for determining arbitrability, while provisions

of other statutes and case law (on a case-by-case basis) establish which specific disputes are non-arbitrable.

3 The Notion of Arbitrability

Generally, Serbian courts do not appear to draw any major distinctions between arbitrability of the subject-matter of dispute, arbitrability in the context of validity of an arbitration agreement, and arbitrability as a requirement for recognition and enforcement, as contemplated in the NYC.

In fact, when dealing with this notion courts have thus far used the statutory terminology only, mostly citing the SAA, without any reference to the NYC.

In that sense, as there is only one statutory definition of arbitrability,[1] the overall stance of Serbian courts currently is that an arbitrable dispute is a "*pecuniary dispute concerning rights [that the parties] can freely dispose of [e.g. dispute which can be settled by the parties[2]], except for disputes that are reserved to the exclusive jurisdiction of courts*".[3]

3.1 Subjective v. Objective Arbitrability

As the SAA's very definition of arbitrability relates to its objective aspect,[4] when Serbian courts refer to arbitrability, they refer solely to its objective notion. Subjective arbitrability is commonly referred to only as capacity.

In practice, some courts have referred to "*territorial and institutional criteria*" for determining arbitrability,[5] to account for differences between domestic and foreign arbitral tribunals, and institutional and *ad hoc* arbitration, respectively. However, these criteria had greater significance in older case law,[6] and have essentially lost their practical meaning in the meantime.[7]

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1 Article 5 of SAA.

2 Higher Commercial Court, Case no. Pvž. 118/2007, 16 February 2007; Supreme Court of Serbia, Case no. Prev. 333/2001, 6 March 2002.

3 Commercial Appellate Court, Case no. 6 Pvž. 98/2013, 6 February 2013; Commercial Appellate Court, Case no. Pž. 6875/2013, 25 September 2013.

4 Article 5 of SAA.

5 Commercial Court in Belgrade, Case no. 3 I 1258/2011, 3 June 2011; Commercial Court in Belgrade, Case no. 3 I 2716/2010, 6 December 2010. However, these courts did not elaborate further on the criteria mentioned.

6 Higher Commercial Court, Case no. Pž. 8215/2000, 31 January 2000.

7 See *e.g.* Milena Jovanović-Zattila, Granice arbitrabilnosti u trgovinskim i drugim sporovima [*Limits of Resorting to Arbitration in Commercial and Other Disputes*], Pravni život br. 12/2007, pp. 568-572; Marko

As for subjective arbitrability (capacity), courts had little room to autonomously define this notion, seeing as the SAA sets out in detail that

> "*Each natural or legal person, including the State, its instrumentalities, institutions and companies in which a State has a property interest, may agree to an arbitration. Anyone having the capacity to be a party in the civil procedure pursuant to the provisions of the statute regulating civil procedure may agree to an arbitration.*"[8]

Furthermore, the statute regulating civil procedure further broadened subjective arbitrability by allowing that

> *"the court may exceptionally [...] recognize the status of a party to such forms of association and organization which have no capacity to be a party [...] if it considers that, taking into account the subject of the dispute, they substantially meet the requirements for acquiring such capacity, and particularly if they hold property that may be subject to enforcement.*"[9]

3.2 Arbitration Agreement or Arbitral Jurisdiction

In general, Serbian courts do not make the fine distinction between arbitrability as a condition of validity of the arbitration agreement and arbitrability as a requirement for arbitral jurisdiction.

In some recent cases, arbitrability was apparently viewed as a *condition of validity of the agreement*.[10] However, in some cases predating the SAA, arbitrability was deemed a *requirement for arbitral jurisdiction*.[11]

4 Applicable Law

Applicable law for assessing arbitrability is not addressed very often in Serbian case law. This is probably owing to the SAA's provisions that a domestic award shall be annulled, or recognition and enforcement of foreign arbitral award shall be denied, if the dispute is not arbitrable "*under the law of the Republic [of Serbia]*".[12] In

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Knežević, O pojmu i značaju arbitrabilnosti [*On the Notion and Importance of Arbitrability*], Zbornik radova Pravnog fakulteta u Novom Sadu, 1-2/2008, pp. 884-885.

8 Articles 5(2) and 5(3) of SAA.

9 Article 74(4) of the Code of Civil Procedure (2011).

10 Commercial Appellate Court, Case no. Pž. 1422/2012, 21 February 2012; Commercial Appellate Court, Case no. Pž. 6875/2013, 25 September 2013.

11 Supreme Court of Serbia, Case no. Prev. 333/2001, 6 March 2002.

12 Articles 58(2)(1) and 66(2)(1) of SAA. The NYC applies the same approach in Article V(2)(a).

addition, a court held that, since the requirement of arbitrability has features of public policy, *lex fori* can be applied to an arbitration agreement which is otherwise governed by foreign law.[13] Therefore, it seems that *lex fori* would be the law which the Serbian courts apply to these issues by default.

However, when it comes to the question of validity of an arbitration agreement, a potentially applicable foreign law could not be completely ignored. According to one case, validity of an arbitration agreement is governed (i) by an international convention (if applicable), (ii) subsidiarily, by *lex fori*, or (iii) if there is a law chosen to govern the arbitration agreement – by both *lex fori* and the chosen law cumulatively.[14]

The cumulative application of *lex fori* and the *law governing the arbitration agreement* is also supported in doctrine.[15] It also is argued that, depending on the stage at which the issue of arbitrability is raised, laws of some other jurisdictions should also be relevant. Along these lines, if the court were to assess arbitrability along with the objection to its jurisdiction, it is well argued that the court should consider arbitrability also under the law of the seat of arbitration. These authors underline that – if a court were to assess its jurisdiction in light of an existing arbitration agreement between the disputing parties, and if the dispute in question would not be arbitrable under the law of the seat of arbitration – not examining arbitrability in light of both *lex fori* and *lex arbitri* could lead to a party ultimately being deprived of both court and arbitral protection. For similar reasons, these authors also argue in favour of assessing arbitrability from the perspective of the law of the place of prospective recognition and enforcement.[16]

On the other hand, the Supreme Court of Cassation recently held that arbitrability of a dispute in question was to be determined taking into account the rules of procedure of the relevant arbitration institution.[17]

Yet, while applicable law for objective arbitrability would be determined as set out above, the rules in respect of the subjective notion are somewhat different. The above cited provisions of the SAA, and the reference to the Code of Civil Procedure

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13 Commercial Appellate Court, Case no. Pž. 1422/2012, 21 February 2012.

14 Higher Commercial Court, Case no. Pvž 118/2007, 16 February 2007. This same stance (verbatim) can be seen in Tibor Varadi *et al.,* Međunarodno privatno parvo [*Private International Law*], Pravni fakultet Univerziteta u Beogradu, 2012, p. 584.

15 Maja Stanivuković, Međunarodna arbitraža [*International Arbitration*], Belgrade, 2013, p. 102.

16 Maja Stanivuković, Međunarodna arbitraža [*International Arbitration*], Belgrade, 2013, pp. 102, 103.

17 Supreme Court of Cassation, Case no. Prev. 113/2015, 29 October 2015. The court was referring to the rules of the Court of Arbitration for Sports in Lausanne – a foreign arbitral institution.

basically set out substantive rules for capacity.[18] However, one should also not neglect the rules contained in the Serbian Private International Law Code, providing that the applicable law for capacity of a natural person is primarily *lex nationalis* (though *lex fori* can be applied subsidiarily), while the law of place of incorporation or the law of the real seat would apply in relation to legal entities.[19]

5 Substantive Content of Arbitrability

5.1 Statutory framework

The substantive content of the standard is set by statutory provisions and further underpinned through case law. As seen above, the general standard is found in Article 5 of SAA ("*pecuniary dispute concerning rights [that the parties] can freely dispose of, except for disputes that are reserved to the exclusive jurisdiction of courts*"). The notion, as developed in practice, boils down to two main questions: (i) whether the parties are legally able to settle their dispute in an arbitration, and (ii) whether or not courts have exclusive jurisdiction over the dispute concerned.

The first question relates to the essential notion of arbitrability *i.e.* the capability of a dispute of being settled by arbitration. An arbitrable dispute, in that sense, should comply with two cumulative requirements: (a) that it is a pecuniary dispute[20], and (b) that the parties may freely dispose of their rights.

"*Pecuniary*" generally means that the dispute should entail or relate to a certain property, acts or assets the value of which can be expressed in monetary terms, as opposed to *e.g.* personal status rights.

On the other hand, the parties' ability to "*freely dispose of*" the rights can be interpreted as an ability for the parties to themselves settle their dispute, i.e. to waive, transfer, assign or otherwise dispose of the right concerned.

The question of exclusive jurisdiction entails the issue whether state courts are exclusively competent to resolve certain disputes.

5.2 Specific examples

Individual grounds for exclusive jurisdiction of state courts were mostly discussed in terms of property rights, insolvency proceedings, privatisations, intellectual property rights and specific corporate matters.

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[18] Articles 5(2) and 5(3) of SAA; Article 74(4) of the Code of Civil Procedure (2011).

[19] Article 79 of the Private International Law Code (1982).

[20] With the exception of sports arbitration as per Article 53 of the Sports Act (2016).

For instance, disputes concerning property rights or lease of real estate located in Serbia were normally considered to be within the exclusive jurisdiction of state courts.[21]

The same stands for insolvency proceedings and all disputes arising out of insolvency proceedings.[22] In that regard, the Commercial Appellate Court even held that claims registered but contested by the receiver also fall within the exclusive jurisdiction of state courts, and are therefore non-arbitrable.[23] The court noted that going through a foreign arbitration would be contrary to the legal interests of the creditor, since its claims could only be enforced within the insolvency proceedings. The doctrine, however, contributed a somewhat different approach. It was argued that the scope of the "insolvency exception" should depend on the specific circumstances of each case and the connection between the substance of the claim and the insolvency proceedings.[24]

Further, the Supreme Court of Cassation consistently held that disputes concerning privatisation of social capital were non-arbitrable seeing as such sales contracts contained public-status elements.[25] Such non-arbitrability was also justified by the public interests of the privatisation process in general.[26] However, certain authors expressed an opinion that the public-status elements of such contracts do not impose limits on the disposal of rights, and that there is no exclusive court jurisdiction prescribed by law which would deprive these disputes of arbitrability.[27]

A further example of non-arbitrable disputes may be those concerning the protection of intellectual property ("**IP**") rights. Pursuant to Article 7 of the Trademark Act (2009), protection of trademarks falls within the jurisdiction of public (administrative) authority. And while a court decision affirming exclusive jurisdiction of state courts over protection of IP rights was remanded,[28] it seems that the reason

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21 Article 56 of the Private International Law Code (1982). Although the prevailing stance so far was that this article does relate to non-arbitrability, legal doctrine has conflicting interpretations of this provision. For a pro-arbitrability stance see *e.g.* Maja Stanivuković, Međunarodna arbitraža [*International Arbitration*], Belgrade, 2013, pp. 104-106. For a contrary view see *e.g.* Vladimir Pavić, National Reports – Serbia, in World Arbitration Reporter, Second Edition, 2010, SERB-13.

22 Article 174a of the Insolvency Act (2009).

23 Commercial Appellate Court, Case no. Pž. 6875/2013, 25 September 2013.

24 Maja Stanivuković, Zakon o stečaju i arbitraža [*Serbian Law on Bankruptcy and Arbitration*], Zbornik radova Pravnog fakulteta u Novom Sadu, br. 1/2014, pp. 124-127.

25 Supreme Court of Cassation, Case no. Prev. 137/2014, 11 December 2014; Supreme Court of Cassation, Case no. Prev. 350/2008, 1 October 2008.

26 Supreme Court of Cassation, Case no. Prev. 350/2008, 1 October 2008.

27 Maja Stanivuković, Međunarodna arbitraža [*International Arbitration*], Belgrade, 2013, pp. 112-113.

28 Commercial Appellate Court, Case no. Pž. 1422/2012, 21 February 2012.

for remanding was the lower instance court's failure to establish the applicable law governing the validity of the arbitration agreement. The lower-instance court's position that exclusive jurisdiction stems from the fact that IP rights have *erga omnes*, and not *inter partes* effects established by a contract, does not seem to have been challenged by the higher instances.

Finally, the Supreme Court of Serbia (although, in a pre-SAA decision) held that withdrawal of share capital was governed by mandatory norms and involved public interests (protection of other shareholders) – which rendered the dispute in question non-arbitrable.[29]

[29] Supreme Court of Serbia, Prev. 333/2001, 6 March 2002.

6 Appendix – Table of Cases

No.	Case designation	NY Convention Provision (II.1; II.3; V.2.a)	Summary of ground for objecting to arbitrability of the dispute	Arbitrability objection admitted	Arbitrability objection rejected
1.	Supreme Court of Cassation Prev. 137/2014 11 December 2014	n/a	The dispute arose as to termination of a privatisation agreement. The main argument underlined that the agreement was concluded based on public authority of the Privatisation Agency. As such agreements were governed by special laws, included a public-status element, and the parties could not freely dispose of such rights, the dispute was declared non-arbitrable.	**X**	
2.	Commercial Appellate Court Pž. 6875/2013 25 September 2013	n/a	A claim was brought against an entity undergoing insolvency proceedings and was deemed non-arbitrable. The court held that the exclusive jurisdiction of courts over insolvency proceedings also entailed their exclusive jurisdiction over claims disputed by the receiver. This position was particularly pronounced in light of the fact that creditors of contested claims are generally able to enforce their claims only through insolvency proceedings.	**X**	

No.	Case designation	NY Convention Provision (II.1; II.3; V.2.a)	Summary of ground for objecting to arbitrability of the dispute	Arbitrability objection admitted	Arbitrability objection rejected
3.	Supreme Court of Cassation Prev. 350/08 1 October 2008	n/a	The dispute revolved around termination of a privatisation agreement which was concluded through public auction, in line with the relevant legislation. The court held that the agreement was a combined contract entailing both public-status and pecuniary elements. The disputed transaction was governed by the Privatisation Act and was therefore considered non-arbitrable.	**X**	
4.	Supreme Court of Serbia Prev. 333/2001 6 March 2002.	n/a	This dispute arose in relation to a withdrawal of share capital. It was argued that the withdrawal affected the interests of shareholders and creditors, involved public interest, and was governed by mandatory norms. The matter was thus declared non-arbitrable.	**X**	
5.	Higher Commercial Court Pž. 8215/2000 31 January 2000	n/a	The main question in this case was whether a domestic arbitral tribunal could resolve disputes arising out of a memorandum of association and an investment agreement containing a foreign element. The conclusion was that the matter was arbitrable.		**X**