To: International Bar Association
Sub-Committee on Recognition and Enforcement of Awards

Attn.: Pascal Hollander

From: Slaven Moravčević
Jelena Bezarević Pajić
Tanja Šumar

Moravčević Vojnović & Partners in cooperation with Schoenherr
SRB-11000 Belgrade, Dobračina 15
PIB: 103901089
Matični broj: 20045221

AUSTRIA
T: +43 1 534 37 0
office.austria@schoenherr.eu

BELGIUM
T: +32 2 743 40 40
office.belgium@schoenherr.eu

BULGARIA
T: +359 2 933 10 70
office.bulgaria@schoenherr.eu

CROATIA
T: +385 1 481 32 44
office.croatia@schoenherr.eu

CZECH REPUBLIC
T: +420 225 996 500
office.czechrepublic@schoenherr.eu

HUNGARY
T: +36 1 345 87 78
office.hungary@schoenherr.eu

MOLDOVA
T: +373 22 240 300
office.moldova@schoenherr.eu

POLAND
T: +48 22 223 09 00
office.poland@schoenherr.eu

ROMANIA
T: +40 21 31967 90
office.romania@schoenherr.eu

SERBIA
T: +381 11 32 02 600
office.serbia@schoenherr.eu

SLOVAKIA
T: +421 2 571 007 01
office.slovakia@schoenherr.eu

SLOVENIA
T: +386 1 200 09 80
office.slovenia@schoenherr.eu

TURKEY
T: +90 (212) 230 17 00
office.turkey@schoenherr.eu

UKRAINE
T: +43 1 534 37 0 - 0
F: +43 1 534 37 0 - 6100
office.austria@schoenherr.eu

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Subject: Arbitrability in Montenegrin 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 Montenegro.

In the first place, the report will briefly examine the notion of arbitrability as generally captured in Montenegrin statutes and endorsed in Montenegrin 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 Montenegrin courts deliberated on this issue.

2 Executive Summary

Montenegro has recently enacted a new piece of legislation governing arbitration. This law addressed arbitrability innovatively compared to previous legislation. For the new law, a matter is arbitrable unless otherwise prescribed in another statute. However, the court and doctrinal interpretation of arbitrability under the new law is still expected.

The available court practice relied on previous legal framework providing for two criteria for arbitrability – dispositive nature of disputes and lack of exclusive court jurisdiction.

As it is now, the difference between objective and subjective arbitrability, was not specifically discussed in court practice. The subjective arbitrability is currently equated with a party's general power and capacity to contract, while in assessing objective arbitrability, the courts seem to apply only *lex fori*.

3 Notion of Arbitrability

Montenegrin general legal framework for arbitration has been considerably developed in the past two years. The latest advance was the enactment of the Arbitration Act, the first specific and uniform piece of legislation governing arbitration in Montenegro which entered into force on 26 August 2015 ("**MAA**").

This new law repealed the earlier conventional definition of arbitrability and introduced a new wording in this respect. The legislator opted to employ a very general language which seems to widen the scope of arbitrability in Montenegro. But, as will be further elaborated, it remains to be seen whether Montenegrin courts will follow this stance in practice.

Although Montenegro is a party to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards ("**NYC**"), Montenegrin courts and jurisprudence did not establish a distinct notion of arbitrability specifically in applying the NYC. In fact, in their pursuit of capturing the notion of arbitrability, the authorities exclusively rely on the notion of arbitrability as provided in Montenegrin statutes.

3.1 Subjective v. Objective Arbitrability

The distinction between subjective and objective arbitrability is mainly drawn by Montenegrin jurisprudence, while the courts focus primarily on the objective aspect of arbitrability.

The specific concept of subjective arbitrability or arbitrability *ratione personae* has begun to attract less importance in Montenegrin legal circles since MAA explicitly stated that

> "*[t]he arbitration considers conduction of arbitration proceedings […] in which the parties are natural persons having their permanent of habitual residence in Montenegro or legal persons established in accordance with Montenegrin law (domestic arbitration) […] or natural persons having their permanent of habitual residence in another state or legal persons established in accordance with the foreign law and having their seat in another state (international arbitration).*"[1]

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[1] Article 2 of MAA.

The MAA provisions further explicitly state that this capacity extends also to

> "*state organ, state administration authority, other legal entity exercising public authority, local self-government authority, company, public enterprise, public institution, non-governmental organisation, investment or other fund, as well as other association or organisation that continuously or periodically obtains or acquires and disposes of assets, as part of its business activities*."[2]

Thus, already pursuant to Montenegrin statutory framework, the question of subjective arbitrability has been reduced to the general issue of power and capacity to contract.

As for the objective arbitrability, the MAA does not refer explicitly to this concept. It also does not provide any particular condition in terms of arbitrability *ratione materiae,* except for the following negative condition that

> "*the arbitration cannot be conducted when the other act stipulates that the particular disputes may not be resolved by arbitration*".[3]

Providing such a broad general definition of arbitrability, the MAA set a general presumption that a matter is arbitrable unless otherwise prescribed in a particular other law.

The jurisprudence also distinguished between the notions of arbitrability *ratione institutionis* and arbitrability *ratione territorii*, to account for differences between institutional and *ad hoc* arbitration, on one hand, and domestic and foreign arbitral tribunals, on the other hand. Although SFRY legislation used to attach importance to these concepts, as of the 1990s these notions seem to have become somewhat formalistic and to have lost their practical meaning.

3.2 Arbitration Agreement or Arbitral Jurisdiction

In general, Montenegrin courts did not yet develop a particular position or practice on the issue whether arbitrability is a condition for validity of the arbitration agreement, or if it serves as a requirement for arbitral jurisdiction. In earlier case law (while Montenegro was still part of the State Union of Serbia and Montenegro), it seemed that arbitrability was deemed a prerequisite for arbitral jurisdiction.[4] However, the referenced decision was based on the old legislation and, in any event

[2] *Ibid*.

[3] Article 3(2) of MAA.

[4] Supreme Court of Serbia, Case no. Prev. 333/2001, 6 March 2002.

did not inspire the development of firm and uniform court practice to that effect, even at that time.

On the other hand, the predominant part of jurisprudence is keen to support that arbitrability is a condition placed on validity of the arbitration agreement.[5]

4 Applicable Law

Montenegrin case law did not, so far, specifically debate the issue of applicable law for assessing arbitrability. Instead, Montenegrin courts have, in practice, simply resorted to applying Montenegrin law (*i.e. lex fori*).

In the context of existing legislation, this position could partly be supported in MAA's provisions regulating the setting aside procedure and the conditions for recognition and enforcement of the foreign arbitral award. The MAA provides, in that respect, that a domestic award shall be annulled, or recognition and enforcement of foreign arbitral award shall be denied, if the dispute cannot be settled by arbitration "*under the laws of Montenegro*".[6]

However, some authors advocate 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.[7]

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[5] Maja Stanivuković, Međunarodna arbitraža [*International Arbitration*], Belgrade, 2013, p. 101; Jelena Perović, Ugovor o međunarodnog trgovinskoj arbitraži [*International Commercial Arbitration Agreement*], Belgrade, 2002, p. 107.

[6] Articles 48(2)(1) and 52(2)(1) of MAA.

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

5 Substantive Content of Arbitrability

5.1 Statutory framework

As stated above, the MAA sets a very general standard of arbitrability providing only that

> "*the arbitration cannot be conducted when the other act stipulates that the particular disputes may not be resolved by arbitration*".[8]

In comparison, the legislation predating MAA, *i.e.* Montenegrin Civil Proceedings Act ("**CPA**"), provided for specific requirements for disputes to be arbitrable. The CPA provided, first, that arbitrable disputes are

> "*disputes which concern rights that the parties can freely dispose of*".[9]

Moreover, the CPA demanded an additional negative requirement for the arbitration agreement – that the dispute in question is not subject to exclusive court jurisdiction.

With the current legislator obviously diverging from the previous legal framework and omitting to maintain these specific limitations, the MAA might be viewed as a step towards expanding arbitrability.

While the wording of MAA's relevant provision indeed seems to refer only to explicit statutory prohibition of arbitration in each particular case, the very nature of arbitration warrants that MAA's arbitrability must also account for the conventional requirement of dispositive nature of disputes. Still, it remains to be seen how Montenegrin courts will construe MAA in terms of arbitrability.

5.2 Specific examples

Until case law under the MAA is developed, in terms of court practice, reference needs to be made to court decisions rendered based on the laws predating MAA.

The objection of (non)arbitrability was frequently discussed in context of insolvency proceedings and the Montenegrin Insolvency Act. This statute provides that disputes arising within or in relation to insolvency proceedings are within the exclusive jurisdiction of the court having its seat in the same territory as the court conducting

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[8] Article 3(2) of MAA.

[9] Article 473 of CPA.

the insolvency proceedings.[10] In this respect, the Montenegrin Appellate Court held that a dispute on termination of a sale and purchase agreement arising within insolvency proceedings was to be resolved exclusively by national courts.[11] Moreover, Montenegrin courts have even held that foreign court judgments may not be recognised and enforced if rendered after the initiation of insolvency proceedings against the insolvency debtor.[12]

However, a part of jurisprudence was of a more nuanced view – the exclusion of arbitrability of those disputes should depend on the specifics of the dispute and the claim at hand. In other words, disputes should not become automatically non-arbitrable only due to the initiation of insolvency proceedings against a party to the dispute.[13]

Arbitrability was also regularly an issue in relation to property rights or lease of real estate located in Montenegro.[14] Montenegrin courts took a common position that they are exclusively competent to render a decision in relation with property rights over the real estate located in Montenegro.[15] Montenegrin jurisprudence further held that if property rights are being transferred by an agreement, the exclusive jurisdiction of Montenegrin courts exists only in relation to the effects *in rem* of the agreement, not its contractual effects.[16]

Non-arbitrability was further specifically analysed in relation to some corporate disputes. The Montenegrin Foreign Investments Act states that disputes with respect

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[10] Article 44 of CPA.

[11] Appellate Court of Montenegro, Case no. Pz. 882/13, 22 January 2013.

[12] Although the courts did not deliberate on the issue of arbitrability in these cases, the position assumed could indicate the direction which the court could take if it were seized of an application for recognition and enforcement of an arbitral award, instead of a foreign court judgment. *See*, Appellate Court of Montenegro, Case no. Pz. 864/14, 15 January 2015; Appellate Court of Montenegro, Case no. Pz. 349/15, 26 May 2015.

[13] Maja Stanivuković, Međunarodna arbitraža [*International Arbitration*], Belgrade, 2013, pp. 108-110.

[14] Montenegrin Private International Law provides for one exception – disputes with regard to lease of real estate concluded for temporary private use for the period of no longer than six consecutive months, provided that the lessee is a natural person and that the lessor and the lessee are domiciled in the same state – in which case a court of another state may also be competent. *See* Article 119 of the Montenegrin Private International Law.

[15] Supreme Court of Montenegro, Case no. Rev. 948/14, 20 November 2014; Appellate Court of Montenegro, Case no. Pz. 854/15, 15 December 2015; Supreme Court of Montenegro, Case no. Rev. IP. 27/13, 13 March 2013; Supreme Court of Montenegro, Case no. Rev. IP. 94/12, 8 November 2012.

[16] Maja Kostić-Mandić, Savremene tendencije u regulisanju međunarodne sudske nadležnosti u pravu Crne Gore [*Contemporary trends in the regulation of the international jurisdiction of the law of Montenegro*], p. 5.

to memoranda of association are capable of being settled by arbitration.[17] The same was confirmed in a decision of the Higher Commercial Court of FR Yugoslavia.[18]

Still, Montenegrin statutory law and court practice have identified certain corporate disputes that are non-arbitrable, *i.e.* where exclusive jurisdiction of Montenegrin courts is prescribed.[19] For instance, a dispute with regard to the request for withdrawal of share capital and restitution of a part of share capital may not be submitted to arbitration, since it was governed by mandatory norms and involved public interests.[20]

Finally, arbitrability was also restricted in relation to some disputes arising out of intellectual property rights. In this respect, the Montenegrin Private International Law provides for exclusive jurisdiction of Montenegrin courts in relation to some intellectual property disputes – in particular, relating to registration or validity of a patent, goods or service trademark, industrial designs or other similar rights to be deposited or registered, if an application for registration or deposit is submitted, or registration or deposit is made in Montenegro.[21] Jurisprudence shared the view that validity of patents and trademarks cannot be subject to arbitration proceedings, since resolution of such disputes may affect third parties' interests.[22] However, it seems that certain disputes arising out of intellectual property rights may be submitted to arbitration. In that sense, the Rulebook of Foreign Trade Arbitration before the Chamber of Economy of Montenegro explicitly states that Foreign Trade Arbitration may resolve disputes arising out of the agreements on intellectual property, in particular copyrights, industrial property rights, rights based on a protection of know-how.[23]

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[17] Article 30 of the Montenegrin Foreign Investments Act.

[18] Higher Commercial Court, Case no. Pz. 8215/00, 31 January 2000; this position is further supported in the Rulebook of Foreign Trade Arbitration before the Chamber of Economy of Montenegro (Article 12).

[19] For example, Montenegrin courts are exclusively competent to resolve disputes concerning the validity of entries in public registers held in Montenegro and for resolving disputes regarding the validity of establishment, nullity or termination of a legal person having its seat in Montenegro or the validity of decisions of their organs. *See* Articles 111 and 118 of the Montenegrin Private International Law.

[20] Supreme Court of Serbia, Case no. Prev. 333/01, 6 March 2002.

[21] Article 122 of the Montenegrin Private International Law.

[22] Aleksandar Goldštajn, Siniša Triva, Međunarodna trgovačka arbitraža [*International Commercial Arbitration*], Zagreb, 1987, p. 137.

[23] Article 12 of the Rulebook of Foreign Trade Arbitration before the Chamber of Economy of Montenegro.

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.	Higher Commercial Court Pz. no. 8215/00 31 January 2000	n/a	This case revolved around the question whether domestic arbitration may be competent for resolving disputes arising out of the memorandum of association and the investment agreement containing a foreign element.		X
2.	Supreme Court of Serbia Prev. 333/01 6 March 2002	n/a	This dispute concerned the withdrawal of share capital (in particular, the return of major part of storage area covering the gate of a free zone). It was argued that this withdrawal affects the interests of shareholders and creditors, that it was governed by mandatory norms and involved public interests.	X	
3.	Appellate Court of Montenegro Pz no. 882/13 22 January 2013	n/a	The dispute concerned the termination of a sale and purchase agreement for a hotel, which arose during or with regard to the insolvency proceedings. The applicant, and the insolvency debtor, moved for termination of the agreement before the competent court in Montenegro, contrary to the existing arbitration agreement.	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
4.	Supreme Court of Montenegro Rev. no. 948/14 20 November 2014	n/a	This case refers to a dispute on property rights over real estate located in Montenegro. It was argued that Montenegrin court has an exclusive jurisdiction to decide the issue at hand.[24]	**X**	
5.	Supreme Court of Montenegro Rev. IP no. 27/13 13 March 2013	n/a	This dispute arose with respect to property rights on real estate located in Montenegro. It was declared that Montenegrin court is competent to resolve the dispute at hand.[25]	**X**	
6.	Supreme Court of Montenegro Rev. IP no. 94/12 8 November 2012	n/a	This dispute on property rights over real estate located in Montenegro was declared to be in the exclusive jurisdiction of Montenegrin courts.[26]	**X**	

[24] In this case, it is not certain if the parties concluded an arbitration agreement. However, the court's position is indicative of the possible outcome in case arbitration was agreed in cases entailing property rights over real estate.

[25] *Ibid*.

[26] *Ibid*.