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NOTES ON ARBITRABILITY
- Focus on objective arbitrability-

Abstract

According to the principle of Kompetenz-Kompetenz, an arbitral tribunal is vested with the authority to decide upon its jurisdiction with respect to any given dispute. In making such a decision, it will review the respective arbitration agreement and it will consider general legal principles affecting its jurisdiction. This decision will inevitably include an assessment as to whether the dispute at hand is arbitrable. The arbitral tribunal's determination, however, is not necessarily final. It might be subject to judicial review. In a motion to set aside the tribunal's determination or during a challenge of the final award at the recognition and enforcement stage, a court may take a `second look' at the arbitrability of a particular matter. The nature of such judicial review has been the subject of extensive scholarly debate in the past.[1] Therefore, when parties and their respective lawyers consider dispute resolution mechanisms for a corporate dispute, they first need to determine whether the dispute is arbitrable or not. As a general rule, corporate disputes are arbitrable. In this text the authors will analyze the objective arbitratibility from comparative perspective and give some comments regarding the Law on International Commercial Arbitration of |Republic of Macedonia.

I. INTRODUCTION

In theory, international arbitration is generally considered to be quicker, more flexible, and less formal than litigation. There is far greater freedom for both the tribunal and the parties: subject to the arbitration agreement provisions, the panel may control the procedures to be employed, the rules pertaining to taking testimony, and evidentiary matters. Therefore, arbitration is at present the best means of peacefully establishing and preserving the rule of law in the world marketplace. It is a flexible process for the final determination of private rights in international context; when parties submit to arbitration they agree to appoint a third party (or third parties, in the case of the multi-member tribunals common in high-value disputes) to act quasi-judicially and finally decide their rights, duties and obligations in the dispute.[2] Among the various ADR mechanisms, arbitration is the closest in spirit to the adjudication process. Unlike other settings, the arbitrator is granted the authority to decide the case and deliver awards to the parties in dispute.[3] This mechanism is widely accepted in commercial disputes, where parties are opting out of the state court mechanism. However, since arbitration is an alternative dispute resolution with public policy consequences, traditionally, some types of disputes are reserved for exclusive court jurisdiction. Such disputes are in the field of bankruptcy, family law and criminal law. According to Redfern and Hunter each state may decide, in accordance with its own

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[1] Patrick M. Baron and Stefan Liniger, A Second Look at Arbitrability, Arbitration International, (Kluwer Law International 2003 Volume 19 Issue 1) pp. 2.
[2] S. Luttrell, *Biast Challenges in International Commercial Arbitration, the Need for a 'real danger' test*, Wolters Kluwer, the Netherlands 2009, 2.
[3] R. Kuttner, "The Arbitrator as Leader and Facilitator: in Tony Cole , *The Roles of Psychology in International Arbitration*, International Arbitration Law Library, Volume, Kluwer Law International 2017, 96.

economic and social policy, which matters may be settled by arbitration and which may not.[4] Furthermore, according to Zoroska Kamilovska, the state cannot permit every dispute between the parties to be decided by arbitration, because the state in certain matters has the right to retain the exclusive court jurisdiction in order to protect the interests of third parties or to protect the public interest.[5]

Turning to the issue of determination of arbitrability, it is generally done in three ways. Firstly, arbitrability may be determined by arbitral tribunal as case of jurisdiction; secondly, the courts of the seat of arbitration may be addressed for an injunction or declaration that a subject-matter is not arbitrable; thirdly, legal proceedings may be commenced on the merits of the dispute which will require the court to decide whether the dispute is arbitrable.[6] One can hardly deny is that the question of arbitratibility of defamation disputes has not been subject of much discussion and analysis. Thus, the authors of this text give an overview of the challenging question concerning the arbitrability in Republic of Macedonia.

This text analyses the boundaries of arbitrability of defamation disputes in Macedonia by providing a comparative overview of the current situation under the legal framework. Thus, objects of this article shall be the legal grounds for arbitrability of defamation disputes in Macedonia and why should parties opt in for arbitration of such disputes.

II. THE PRINCIPLE OF ARBITRABILITY – GENERAL CONSIDERATIONS

Arbitrability is concerned with the question of whether a dispute is capable of settlement by arbitration under the applicable law. The pivot of arbitration is the arbitration agreement. In order for the arbitration agreement to be effective, it must be the result of the valid consent of the parties. However, it must also be lawful. This means, first, that the agreement must relate to subject-matter which is capable of being resolved by arbitration and, second, that the agreement must have been entered into by parties entitled to submit their disputes to arbitration. These considerations are referred to under the heading of arbitrability, and are founded upon the protection of the general interest. This is as opposed to the requirement of valid consent, which is intended to protect the private interests of the parties to the arbitration agreement.[7]

Domestic legal systems govern, control, and enforce international arbitration in various ways. Most legal systems have laws on arbitration, known as *lex arbitrii*, which govern party autonomy to have recourse to arbitration, the arbitral procedure, the applicable law, and the validity and effects of arbitral awards. These laws also give to domestic courts, jurisdiction to control, assist, and enforce arbitration.[8]

In formal treatments of subject, arbitrability is typically divided into "subjective arbitrability" and "objective arbitrability".[9] Hence, a first distinction has to be made between subjective arbitrability – by reason of the quality if one of the parties, when this party is a State, a public collectivity or entity of public body; and objective arbitrability, by reasons of the subject

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[4] N. Blackaby, C. Partasides, A. Redfern, M. Hunter, *Redfern and Hunter on International Arbitration*, Oxford University Press, New York 2009, .124.

[5] See T. Zoroska Kamilovska, *Арбитражно право*, Skopje 2015, p. 90.

[6] A.Tweeddale, K.Tweeddale, *Arbitration on Commercial Disputes, International and English Law and Practice*, Oxford University Press, New York 2005, 108.

[7] P. Fouchard, E. Gaillard, B. Goldman, Fouchard, *Gaillard, Goldman on International Commercial Arbitration*, Kluwer Law International, The Hague 1999, 311.

[8] D. Bentolila , *Arbitrators as Lawmakers*, International Arbitration Law Library, Volume 43 , The Hague 2017, 7.

[9] Ibidem, 312.

matter of the dispute which has been removed from the domain of arbitrable matters by the applicable national law.[10] Thus, arbitrability is one of the issues where the contractual and jurisdictional natures of international commercial arbitration collide head on. It involves the page simple question of what types of issues can and cannot be submitted to arbitration and whether specific classes of disputes are exempt from arbitration proceedings.[11]

In the legal theory, some authors perceive arbitrability as contractual, while others see as a judicial question. Karim Youssef deems the question of arbitrability as contractual. An *objective* notion, arbitrability is also the fundamental expression of freedom to arbitrate. It defines the scope of the parties' power of reference or the boundaries of the right to go to arbitration in the first place. With respect to all non-arbitrable matters, courts retain exclusive jurisdiction and parties lack jurisdictional autonomy about *where* they can settle their dispute.[12] On the other hand, according to Stavros Brekoulakis, arbitrability is a judicial question. Arbitrability is, thus, a specific condition pertaining to the jurisdictional aspect of arbitration agreements, and therefore, it goes beyond the discussion on validity. Arbitrability is a condition precedent for the tribunal to assume jurisdiction over a particular dispute (a jurisdictional requirement), rather than a condition of validity of an arbitration agreement (contractual requirement).[13] Thus, the question of arbitrability determines the confines within which dispute is appropriate to be settled by arbitration.

1. Subjective *arbitratbility*

Subjective arbitrability means the personal legal capacity of the parties, including the power to conclude an arbitration agreement. It concerns the capacity of the person who entered into arbitration agreement to have its disputes solved by arbitration. Thus, in order to make subjective arbitrability come into existence, a person it refers to must be entitled either with individual rights to enter into such legal relationship or, in case of state entity, it must be endowed with legal capacity to enter into arbitration agreement. To put it in opposite terms, subjective non-arbitrability generally relates to deficiencies in contractual capacity and thus, affects the validity of the arbitration agreement.[14]

2. *Objective arbitrability*

For an arbitration agreement to be enforceable, the subject matter hat to be arbitrable, that is, it has to be a subject that the state considers appropriate to be arbitrated.[15] In principle any dispute should be just as capable of being resolved by a private tribunal as by the judge of a national court. However, since arbitration is a private proceeding with public consequences,

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[10] B. Hanotiau, „The Law Applicable to Arbitrability" *Singapore Academy of Law Journal*, 26 SAcLJ 2014, 875.

[11] L. A. Mistelis, Part I Fundamental Observations and Applicable Law, Chapter 1 - Arbitrability – International and Comparative Perspectives in Loukas A. Mistelis and Stavros L. Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives*, International Arbitration Law Library, Volume 19 Kluwer Law International 2009, 2-3.

[12] K. Youssef, Part I Fundamental Observations and Applicable Law, Chapter 3 - The Death of Inarbitrability in Loukas A. Mistelis and Stavros L. Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives*, International Arbitration Law Library, Volume 19, Kluwer Law International 2009, 49.

[13] S. Brekoulakis, Part I Fundamental Observations and Applicable Law, Chapter 2 - On Arbitrability: Persisting Misconceptions and New Areas of Concern in Loukas A. Mistelis and Stavros L. Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives*, International Arbitration Law Library, Volume 19, Kluwer Law International 2009, 39.

[14] N. Freimane, Arbitrability: Problematic Issues of the Legal Term, Riga 2012, 21.

[15] M. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press, Cambridge 2008, 31.

some types of disputes are reserved for national court proceedings are generally in the public domain. It is in the sense that they are not "capable of settlement by arbitration.[16]

Arbitration legislation or judicial decisions in many states provide that particular categories of disputes are not capable of settlement by arbitration, or "nonarbitrable." In some jurisdictions, this defense is referred to as "objective arbitrability," or "arbitrability *ratione materiae*," while, in other jurisdictions, it is termed the "nonarbitrability" doctrine. Both international arbitration conventions (including the New York Convention) and national law provide that agreements to arbitrate such "nonarbitrable" matters need not be given effect, even if they are otherwise valid, and that arbitral awards concerning such matters also need not be recognized.[17]

Thus, "objective arbitrability", relates to whether the subject matter of the dispute may be validly submitted to arbitration or whether it belongs exclusively to the domain of the state courts. If the subject matter of the dispute is non-arbitrable, the arbitration agreement cannot confer jurisdiction upon the arbitral tribunal.[18] The rationale for this is that certain matters are considered to be so important to the operation of justice or the running of business that they are reserved exclusively to the control of the courts.[19]

Each state decides which matters may or may not be submitted to arbitration in accordance with its own political, social and economic policy. Also, there are some limitation set by international law and international public policy. Schematically, we can describe three levels of sources of possible limitations:

- National/unilateral limitations emanating from State law,
- Supranational limitations emanating from regional or international statutes, e.g., European law and
- Transnational limitations emanating from a common core of public policy as perceived by an arbitration (often called, following the suggestion of Lalive, truly international public policy).[20]

2.1. *The Law Governing Arbitrability*

The non-arbitrability doctrine was frequently invoked during the 20th century. National courts concluded that a variety of claims were non-arbitrable, applying expansive, sometimes ill-defined, conceptions of public policy. More recently, courts in most developed jurisdictions have materially narrowed the non-arbitrability doctrine, typically applying it only where statutory provisions expressly require. In most instances, this has involved a limited set of "mandatory law" claims, which parties are not free to contract out of in advance and which fairly clearly require resolution in judicial or other specialized forums.[21]

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[16] [16] N. Blackaby, C. Partasides, A. Redfern, M. Hunter, *Redfern and Hunter on International Arbitration, Student version,* Oxford University Press, New York 2009, 124.

[17] G. Born, *International Commercial Arbitration (Second Edition),* Kluwer Law International; The Hague 2014, 943.

[18] D. Girsberger and N. Voser , *International Arbitration: Comparative and Swiss Perspectives (Third Edition),* Kluwer Law International 2016, 77.

[19] .Tweeddale, K.Tweeddale, *Ibidem* 111.

[20] C. Pamboukis, On Arbitrability: The Arbitrator as a Problem **Solver** in Loukas A. Mistelis and Stavros L. Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives*, International Arbitration Law Library, Volume, Kluwer Law International 2009, 122.

[21] G. Born , *International Arbitration: Law and Practice (Second Edition),* 2nd edition, Kluwer Law International 2015, 73-90, B.

Insofar as issues of arbitrability are concerned, there seems to be a consensus among international arbitration scholars and practitioners that different rules apply depending on whether the arbitrability question arises prior to or during the conduct of the arbitration proceedings, or after the rendition of the award, at the stage of its recognition and enforcement.[22] In particular, according to the principle of Kompetenz-Kompetenz, an arbitral tribunal is vested with the authority to decide upon its jurisdiction with respect to any given dispute. In making such a decision, it will review the respective arbitration agreement and it will consider general legal principles affecting its jurisdiction. This decision will inevitably include an assessment as to whether the dispute at hand is arbitrable. The arbitral tribunal's determination, however, is not necessarily final. It might be subject to judicial review. In a motion to set aside the tribunal's determination or during a challenge of the final award at the recognition and enforcement stage, a court may take a `second look' at the arbitrability of a particular matter.[23]

The parties' choice of the seat of arbitration not only determines the law governing the proceedings, and sometimes the law governing the arbitration agreement, but it also generally governs the question of arbitrability. Because different jurisdictions may have different approaches to arbitrability, a tribunal faced with an arbitrability question must decide whether to apply the law of the seat, the law chosen by the parties, the law of the enforcing jurisdiction, or another law.[24] Most tribunals will apply the law of the place of arbitration. If the award is not considered arbitrable in the place of arbitration, it is quite likely that an award would be vacated by the court in that jurisdiction.[25] Under Article 34 (b) (i) of the UNCITRAL Model Law on International Commercial Arbitration, 1985/2006 (hereafter in: UNCITRAL Model Law). At the award enforcement stage, Article V (2) (a) of the New York Convention explicitly mentions that a contracting state may refuse enforcement of an award if "the subject matter of the dispute in not capable of settlement by arbitration under the law of that country". Clearly the law of the forum would apply to that analysis.[26]

2.2. *Arbitrability under the New York Convention*

Lack of arbitrability is a ground for refusing enforcement of an award under the New York Convention. Article V(2) (a) of the New York Convention contemplates a uniform rule of conflict addressing issues of arbitrability that may arise at the stage of recognition and enforcement of the award. Under this article "[r]*ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the dispute is not capable of settlement by arbitration under the law of that country*." Thus, at the stage of the enforcement and recognition of an arbitral award, issues of arbitrability must be dealt with under the *lex loci fori*. In other words, under article V (2) (a), the party resisting recognition and enforcement on an international arbitral award must demonstrate that the subject matter of dispute is not arbitrable

[22] F. Emanuele and M. Molfa , *Selected Issues in International Arbitration: The Italian Perspective*, Thomson Reuters 2014, 21.
[23] Patrick M. Baron and Stefan Liniger, A Second Look at Arbitrability, *Arbitration International*, Kluwer Law International 2003 Volume 19 Issue 1, 27.
[24] M. Mosses, op. cit. , 68.
[25] Ibidem, 68.
[26] D. Lindsey, Y. Lahlou, The Law Applicable to International Arbitration in New York, in J. Carter and J. Fellas, *International Commercial Arbitration in New York*, Oxford University Press 2010, 25.

in the place where recognition and enforcement are sought.[27] It is the law of the enforcement court that governs whether the dispute was arbitrable or not.[28] In contrast to this clear rule at the enforcement stage the New York Convention does not contain a rule as to what law governs the question of page arbitrability at the pre-award stage.[29]

Article V(2)(a) is a ground that a court may invoke ex officio and the delegates did so as to enable the courts of Contracting States to safeguard domestic laws on arbitrability. That is the rationale of this provision.[30] It is important to point out the permissive language in art. V(1) and (2). A court 'may' (therefore is not obliged to) refuse enforcement if one of the exceptions to the general rule favouring enforcement is satisfied. In other words, even where one or more grounds allowing refusal of enforcement is proven, the court enjoys residual discretion to enforce the award (*China Nanhai Oil Joint Service* (Hong Kong)). It is important to stress that, in some countries, the permissive 'may' in art. V is sometimes interpreted as having the meaning of a positive obligation not to enforce (BGH 2 November 2000). Nonetheless, the reading of art. V as only allowing refusal of recognition and enforcement of foreign arbitral awards in the presence of certain grounds without imposing an actual obligation to that effect must be preferred. Indeed, the permissive language appearing in the English version of art. V (using the word 'may') does not seem to clash with the other official versions of the Convention. The same permissive language features in the Chinese, Russian and Spanish versions. It is interesting to note in this respect that the French text does not seem to contain, at first sight, language as permissive as the English text. Indeed, the French text provides that recognition and enforcement 'seront refusées', i.e., shall be refused. Nonetheless the courts of France themselves seem to interpret art. V in line with the more permissive language adopted under the English version.[31]

Several commentators have expressed the view that Article V(2)(a) is tautological since its purpose and scope are already covered by the general public policy defence under Article V(2)(b). However, nonarbitrability derives from the exclusive jurisdiction of a national court. As such, subparagraphs (a) and (b) of Article V(2) call for two different types of scrutiny. The first pertains to the jurisdiction of a State authority, and constitutes an absolute procedural bar to the recognition of an arbitral award, irrespective of its findings. The second pertains to the merits, and sets standards to be respected by arbitrators and their awards.[32]

2.3. *Arbitrability in the UNCITRAL Model Law*

The inarbitrability of a dispute is a ground for annulment and for refusal of recognition and enforcement of arbitral award under the UNCITRAL Model Law. Inarbitrability is provided under art. 34 of the UNCITRAL Model Law, as an ex officio ground of annulment of an arbitral award. Article 34 (2) of the UNCITRAL Model Law expressly provides that the courts at the place of arbitration may set aside an award if the matter is not arbitrable under the lex fori. Art.

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[27] J. Pierce, D. Cinotti, Challenging and Enforcing International Arbitral Awards in New York Courts, in J. Carter and J. Fellas, *International Commercial Arbitration in New York*, Oxford University Press 2010, 393.
[28] G. Cordero-Moss, *International Commercial Contracts*, Cambridge University Press, United Kingdom 2014, 261.
[29] J. Lew , L. Mistelis , et al., *Comparative International Commercial Arbitration*, Kluwer Law International; Kluwer Law International 2003, 188.
[30] M. Paulsson , *The 1958 New York Convention in Action*, Kluwer Law International 2016, 221.
[31] L. Mistelis, D.diPietro, New York Convention, Article V [Grounds to refuse enforcement of foreign arbitral awards] in Loukas A. Mistelis (ed), *Concise International Arbitration (Second Edition)*, 2nd edition Kluwer Law International 2015, 19.
[32] H. Arfazadeh, Arbitrability under the New York Convention: the Lex Fori Revisited, *Arbitration International Volume 17 Number 1*, LCIA 2001, 86.

36(1)(b)(i) UNCITRAL Model Law only permits the refusal of the recognition and enforcement of an arbitral award if the subject matter is not arbitrable under the laws of the recognizing state.

However, the Model Law does not provide for a definition of the scope of arbitrability, leaving this matter to the national legislators. Indeed model law countries set out different standards of arbitrability; accordingly, case law on this matter would depend on the national standards on arbitrability.[33] The group of disputes not capable of settlement by arbitration will vary from national law to national law, but will typically include matrimonial and family disputes, criminal matters, certain intellectual property disputes, and certain bankruptcy-related disputes.[34]

2.4. *Arbitrability under the national law*

In various jurisdictions, different terms and phrases are used to delimit arbitrability. These include "that the subject matter for arbitration must be one which can be the subject of compromise by those capable of legally disposing their rights"; "an arbitration agreement may cover issues between parties which are capable of being the subject of civil action but that an award should not be made affecting the status of a person or thing or determining any interest in property except as between the parties themselves"; "any natural person or corporate body may have recourse to arbitration on rights which he has free disposal" "any actual or future dispute arising out of a specific juridical relationship as to which parties have capacity to settle their claim can be made the subject of an arbitration."[35]

Each state decides which matters may or may not be submitted to arbitration in accordance with its own political, social and economic policy. Some states allow any matter to be arbitrated which the parties may freely dispose of. This is the solution in Belgium, Italy, the Netherlands and Sweden. In others states, arbitrability is extended to all pecuniary claims (*cause de nature patrimoniale; vermogensrechtlicher Anspruch; pretesa patrimoniale) - e.g.,* Article 177(1) of the Swiss Statute on PIL, Article 1030(1) of the German ZPO and Article 582(1) of the Austrian Code on Civil Procedure. According to the last two mentioned laws, non-pecuniary claims are arbitrable as well, if parties are capable of concluding a settlement upon the matter in dispute. These laws are an example of how a general tendency in both statutory and case law can enlarge the range of arbitrable disputes in such a manner.[36] In the arbitration theory and practice, there are several categories of dispute for which question of arbitrability arise:

- Patents, trademarks, and copyright;
- Antitrust and competition laws;
- Insolvency;
- Bribery and corruption;
- Fraud;
- Natural resources;
- Embargo and etc.

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[33] S. Brekoulakis, L. Shore, United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985/2006, in L. Misterlis, *Concise International Arbitration*, Kluwer Law International 2010, 647-648.

[34] M. McIlwrath, J. Savage , *International Arbitration and Mediation: A Practical Guide*, Kluwer Law International 2010, 337.

[35] P. Obo Idornigie, The Principle of Arbitrability in Nigeria Revisited, *Journal of International Arbitration 21(3),* p.282, 2004.

[36] K. Sajko, On Arbitrability In Comparative Arbitration - An Outline, *Zbornik PFZ,* 60, (5) 961-969 (2010), 962.

Germany: By defining the arbitrability, the national legislator determines conclusively the extent to which disputes are open to arbitration and at the same time reserves certain disputes to state court jurisdiction. However, in light of the broad scope of arbitrability under German law, § 1059 (2) No. 2 (a) ZPO, it is of little practical importance. Under the new law, most of the previously controversial questions of company law are now clearly arbitrable, as well as competition law and patent law issues. Not arbitrable are disputes concerning residential lease agreements which in case of a dual use of the rented property require, however, that the emphasis of use is on the residential part.[37]

Switzerland: Pursuant to Article 177(1) of the Swiss CPIL, a dispute relating to any economic interest can be the subject matter of arbitral proceedings, regardless of whether the substantive law governing the underlying contractual relationship relies on a narrower definition of "objective arbitrability". The arbitral tribunal does not have to inquire into the substance of the applicable substantive law in order to determine whether a claim is arbitrable.[38]

Bosnia and Herzegovina: In terms of arbitrability, the Civil Procedure Code defines that any current or future dispute can be settled in arbitration proceedings, provided that such settlement would not be contrary to the mandatory rules of BiH law. In principle, it can be concluded that disputes in which BiH courts have exclusive jurisdiction cannot be settled in arbitration proceedings. Such approach has been confirmed in the court decision of the Canton Court of Tuzla (subsequently upheld by the Supreme Court of FBiH) no. R-72/02. Namely, the court rejected recognition of a foreign arbitral award stating that it was related to a claim for damages arising out of a lease agreement of real estate located in BiH. The court concluded that the BiH courts have exclusive jurisdiction for settlement of such disputes and on those grounds refused to recognize the award.[39]

Croatia: The definition of arbitrability under the Croatian Arbitration Act is a broad one, since according to Article 3 (1) parties may, in general, arbitrate disputes regarding rights of which they may freely dispose. The vast majority of Croatian scholars agree that under the Croatian Arbitration Act disputes are arbitrable if they refer to disposable rights, regardless of the legal basis of the claim, i.e. even if they are based on mandatory rules e.g. rules of competition law, labor law etc.[40] However, the Supreme Court in case no. Revr 500/08-2 of 21 January 2009 held the dispute arising out of a termination of employment agreement is not arbitral, since termination of employment is regulated by mandatory rules.[41]

Serbia: The Serbian Law has explicitly defines that "*parties may agree to an arbitration for the resolution of a pecuniary dispute concerning rights they can freely dispose of, except for disputes that are reserved to the exclusive jurisdiction of courts*" (Article 5 of the Law).

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[37] S. Kröll and P. Kraft, Part II: Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure), Chapter VII: Recourse against the Award, § 1059 – Application for Setting Aside in Karl-Heinz Böckstiegel , Stefan Michael Kröll , et al. (eds), *Arbitration in Germany: The Model Law in Practice (Second Edition)*, 2nd edition, Kluwer Law International 2015, 411.

[38] F. Dickenmann,Arbitration in Switzerland, in CMS Guide to Arbitration, Vol. 1 2012, 882.

[39] D. Duraković-Morankić, N. Jevremović, Arbitration, Country report for Bosnia and Herzegovina, in Civil Law Forum for South East Europe, *Collection of studies and analyses*, Third Regional Conference, Tirana 2013, 210.

[40] D. Zgrabljic Rotar, Arbitration, Country Report for Croatia, in Civil Law Forum for South East Europe, *Collection of studies and analyses*, Third Regional Conference, Tirana 2013, 227-228.

[41] Decision of the Supreme Court of the Republic of Croatia No. Revr 500/08-2 of 21 January 2009.

Accordingly, all pecuniary disputed that fall outside of the scope of courts' exclusive jurisdiction are deemed arbitrable.[42]

Turkey: There is no special provision regulating arbitrability under the International Arbitration Law. However, Article 1(4) provides the following: This law shall not be applicable to disputes relating to real (in rem) rights concerning immovable property located in Turkey and to disputes that are not at the free will of the parties.' The Code of Civil Procedure contains a special provision regulating arbitrability under Article 408, entitled 'Arbitrability', which is identical to the above mentioned provision of the International Arbitration Law in terms of its content: 'Disputes relating to real (in rem) rights concerning immovable property or disputes that are not at the free will of the parties are not arbitrable.' According to both the wording of the provision and the scholarly views, Article 408 of the Code of Civil Procedure is an imperative provisionbut it shall not be strictly interpreted in a way that will prevent the use of arbitration. As a presumption, most disputes under Turkish law fall under the scope of arbitrable disputes.[43] Since the essential element of an arbitration agreement is the clear intent of the parties to arbitrate, it is natural that subject matters that are not at the free will of the parties are not arbitrable. Under Turkish Law, matters that could be subject to free and final agreements (especially settlements) by the parties are arbitrable. There is no list in Turkish law as to which subjects are not at the free will of the parties. However, pursuant to the general principles of law and the decisions of the Court of Appeal, we are at least able to come up with a non-exhaustive list to demonstrate what matters are regarded as being not subject to the free will of the parties.[44]

Republic of Macedonia: Under the dualistic approach, there is a difference between domestic and international arbitration in Macedonia. Domestic arbitration is regulated by the Law on Civil Procedure (see chapter 30 of this Law - procedure in selected courts). [45]

International Commercial Arbitration is regaled by the Law on International Commercial Arbitration from 2006.[46] Arbitration is international if: 1) at least one of the parties, at the time of the conclusion of the arbitral agreement, is a natural person with domicile or habitual residence abroad, or a legal person whose place of business is abroad; or 2) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected.[47]

Article 1 (2) (6) of the Law on International Commercial Arbitration set the limits of the objective arbitratbility: … "The international commercial arbitration, resolves disputes concerning matters in respect of which the parties may reach a settlement"[48]… and "this Law shall not affect any other law of Republic of Macedonia by virtue of which certain disputes may be subject only to the jurisdiction of a court in the Republic of Macedonia".[49] Thus, all pecuniary disputes that fall outside the scope of courts' exclusive jurisdiction are deemed arbitrable. For example, parties cannot agree on arbitration for their family or succession disputes since parties are not allowed to freely dispose with their rights. As for the exclusive jurisdiction, such type of

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[42] U. Zivković, Country Report for Serbia, in Civil Law Forum for South East Europe, *Collection of studies and analyses*, Third Regional Conference, Tirana 2013, 267.

[43] E. Balssen and E. Kınıkoğlu, Drafting Arbitration Agreements and Arbitrability, in Ismael Esin and Ali Yesilirmak (eds), *Arbitration in Turkey*, Kluwer Law International 2015, 42-43.

[44] Ibidem, 44.

[45] Official Gazette of Republic of Macedonia, no.79/2005, 110/2008, 116/2010, 124/2015.

[46] Official Gazette of Republic of Macedonia, no 39/2006.

[47] See Article 3 (1) of the Law on International Commercial Arbitration.

[48] See Article 1 (2) of the Law on International Commercial Arbitration.

[49] See Article 1 (6) of the Law on International Commercial Arbitration.

jurisdiction is regulated by the Private International Law Act. For example, if parties were to agree to submit their dispute concerning entries into public registers kept in the Republic of Macedonia, such an agreement would be null and void. This comes as a consequence of the explicit provision under the Private International Law Act on exclusive jurisdiction over disputes relating to entities into public registers.[50] Similar situations would arise in the context of IP rights related to their existence and validity, if the application was filed in the Republic of Macedonia.[51]

As for the domestic arbitration, similar provision is contained in article 441. Under this article, disputes without international element on the rights at free disposal of parties can be settled in the permanent selected courts, founded by the chamber of commerce and other organizations anticipated by law, unless the law determines that certain types of disputes shall be exclusively decided by another court.[52]

Thus, it can be concluded, that the rules of arbitrability are set quite broadly. All disputes that meet the following two conditions may be submitted to arbitration: a) that there is a dispute over the rights of free disposal of the parties and b) that the dispute does not fall within the scope of exclusive jurisdiction of the court of the Republic of Macedonia.

IV. CONCLUSION

The objective arbitrability, which determines the range of arbitrable disputes, primarily is set up by mandatory rules of national law. Such disputes are in the field of bankruptcy, family law and criminal law. Each state decides which matters may or may not be resolved by arbitration with its own political, social and economic policy. The legislators and courts in each country must balance between the domestic importance of reserving matters of public interest to the courts against the more general public interest in promoting trade and commerce and the settlement of disputes.[53] In Republic of Macedonia, the rules of arbitrability are set quite broadly. All disputes that meet the following two conditions may be submitted to arbitration: a) that there is a dispute over the rights of free disposal of the parties and b) that the dispute does not fall within the scope of exclusive jurisdiction of the court of the Republic of Macedonia.

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[50] See Article 66 of the Private International Law Act, Official Gazette of Republic of Macedonia, no. 87/2007, 156/2010.
[51] See Article 67 of the Private International Law Act.
[52] See Article 441 of the Law on Civil Procedure.
[53] Redfern and Hunter, op. cit. 124.

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