JOURNAL OF ALTERNATIVE DISPUTE RESOLUTION IN KOSOVO

VOL. III

November 2016

ARBITRATION CENTER
AMERICAN CHAMBER OF COMMERCE IN KOSOVO

AMERICAN CHAMBER OF COMMERCE IN KOSOVO
ODA EKONOMIKE AMERIKANE NË KOSOVË
ARBITRATION CENTER
QENDRA E ARBITRAZHIT

WWW.ARD-KS.ORG

ALTERNATIVE DISPUTE RESOLUTION JOURNAL IN KOSOVO

Volume 3, November 2016

Publisher
Arbitration Center
American Chamber of Commerce in Kosovo

UDC 341.6 (05)
347.97/.00 (486.51)(05)

TABLE OF CONTENTS

FOREWORD

Anjezë Gojani 1

Practice of International Courts and Arbitral Tribunals in Interpreting Pathological Arbitration Clauses

Fjolla Krasniqi 3

Dutco Revisited: An Institutional Analysis of the Appointment Process of Arbitrators in Multi-Party Cases

Petrit Elshani and Arnis Dumani 22

Extent of Court Intervention on Arbitration under Kosovo Arbitration Law and UNCITRAL Model Law

Mentor Bislimi 41

Prospects for Developing Sports Arbitration in Kosovo

Luljeta Plakolli – Kasumi and Vjosa Misini 59

FOREWORD

Dear reader,

The Arbitration Center is pleased to share with you the Third Volume of its Alternative Dispute Resolution Journal, the second publication during this calendar year. While legal practitioners, members of the academia, and the young generation of lawyers remain amongst our consistent audience, the interest of the latter group, both in terms of readership and contributions, is consistently rising. The interest of the young generation of lawyers is being channeled through conducting research for the journal just as much as relying on the journal as a relevant source of information for their daily work.

The volume in front of you provides an analysis of several distinct topics in international commercial arbitration. Initially, it provides an analysis of the importance of drafting
1 arbitration agreements, the results of defective arbitration agreements, and the stance of international arbitration tribunals on this matter. This article corresponds with the work that the Arbitration Center has been consistently conducting towards educating the potential arbitration stakeholders on the importance of properly drafted agreements. Then, the journal provides an analysis of one of the most important procedural actions during the arbitration proceedings - that of the arbitrator appointment process in multiple party proceedings. Further, a topic presented within this volume is also the matter of the extent of court intervention in arbitration proceedings. Lastly, this volume features a special article on a new and less-than-studied topic of arbitrating sports disputes, after Kosovo's international breakthrough in sports, particularly by acquiring membership to international sports organizations.

In the long run, we believe that the Journal will serve as a platform for sharing ideas but also as a platform which provides information to the public regarding the importance of international commercial arbitration and other forms of alternative dispute resolution, as emerging areas of law in Kosovo. This volume is a result of several months of work, which would not have been possible without the contributions of the authors as well as the remarkable

commitment of the Editorial Board towards consistently improving the overall quality of the Journal.

While we hope that you will find our topic selection of interest, join us in supporting the Alternative Dispute Resolution Journal towards making it a lasting success.

Sincerely,

Anjezë Gojani

Secretary General of Arbitration Center

UDC 341.63

Practice of International Courts and Arbitral Tribunals in Interpreting Pathological Arbitration Clauses*

Fjolla Krasniqi**

Abstract

Arbitration as an alternative method of dispute resolution, is a creature of contract. Parties to the arbitration agreement determine the scope and method for the arbitration proceedings to which they consent and, unlike litigation, parties cannot be forced to arbitrate against their will. Despite their essential importance, arbitration clauses are still somewhat neglected by the parties who are too busy tailoring other commercial terms of the transaction. As a result of this, judicial forums internationally are increasingly faced with the task of interpreting "pathological" or defective arbitration. The culprits of "pathological" arbitration clauses are many, and this paper tries to shed light on what some of them might be. While the "pathologies" differ and some of them even render the arbitration clause invalid, this paper suggests that the practice of international courts and arbitration tribunals inclines towards upholding arbitration clauses in spite of their defects.

Introduction

A well-drafted arbitration clause significantly influences the way parties to an international commercial relationship resolve disputes. It affects the efficiency, fairness, and the ultimate result of the dispute resolution proceedings.[1]Arbitration clauses determine the rules

* *This Research Paper is a contribution to TLP Citizens Corps Project. The views and opinions expressed in this research paper are those of the author and do not necessarily reflect the official policy or position of TLP Citizens Corps. Assumptions made within the analysis are not reflective of the position of any government entity.*

governing the most important elements of the arbitration proceedings, including, but not limited to, the seat of arbitration, language and rules of procedure. However, despite this unparalleled importance, practitioners and parties oftentimes are more focused on other clauses and do not give the arbitration clause the importance it deserves. When hastily drafted, the arbitration clause is much more prone to inadequacy, vagueness and/or ambiguity, and this may lead to the invalidation of the clause itself. It is almost certain that such clauses will at least cause delays in the arbitral procedures -- which result in larger expenses to the parties. However, what is worse, such faulty arbitration clauses may also render the arbitration clause null and void, depending on the interpretation of the clause by the competent body. This is what we refer to as "pathological" arbitration clauses. The expression "pathological clause" was first used by Frederic Eisemann in 1945 and has since become a popular phrase in international commercial arbitration.[2]

4 When seeking to find the cause or culprit to the prevalence of "pathological clauses" in today's world, all fingers point to the drafters of the clause who most of the time are lawyers. Finding themselves in the heat of striking an important deal, lawyers often ignore the importance of a custom-made arbitration clause, which is tailored to the specific transaction. Another problem might be the specialization of the lawyers who draft the arbitration clause. Transactional lawyers, who are often at the helm of negotiating deals, may not be very familiar with the consequences of a poorly drafted

---

*** Fjolla Krasniqi is a graduated lawyer from Kosovo, with a master's degree from the University of Pittsburgh, School of Law, where she focused in areas such as Alternative Dispute Resolution, Commercial Law, Labor Law, Secured Transactions and Corporate Law. Ms. Krasniqi has worked with Robert A. Creo, a highly accomplished arbitrator/mediator in the state of Pennsylvania (United States), while in the past she also worked with the Permanent Tribunal of Arbitration at Kosovo Chamber of Commerce as well as the with the Legal Department of Banka Kombetare Tregtare in Prishtine. She is a freelance legal consultant to businesses and individuals in Kosovo.*

[1] Moses, Margaret L., Drafting the Arbitration Agreement (March 14, 2012). PRINCIPLES AND PRACTICES OF INTERNATIONAL ARBITRATION, 2ND ED., Chapter 3, Cambridge University Press, 2012; Loyola University Chicago School of Law Research Paper No. 2012-003. Available at SSRN: http://ssrn.com/abstract=2022464

[2] *See* W. Laurence Craig, William W. Park, & Jan Paulsson, International Chamber of Commerce Arbitration, 127, n. 1 (2000)

arbitration clause. [3] In order to have a better picture of the potential pitfalls in drafting an arbitration clause, in this paper I will list and analyze the most common issues found in pathological arbitration clauses.[4]

When disputes arise, the parties find themselves at the mercy of the courts which are competent to review and interpret a pathological arbitration clause. The analysis in this paper will focus in select cases from jurisdictions where arbitration practice is more developed such as the United States, Switzerland, Singapore and Hong Kong. As it will be further elaborated in this paper, the U.S. practice and the international practice do not differ so much when interpreting pathological arbitration clauses, and the uniformity of the decisions, albeit some minor subjective differences, looks astounding. While Kosovo is not a signatory of the New York Convention yet[5], it has embedded the core principles of the New York Convention in its Law on Arbitration.[6] Therefore, the interpretation of arbitration clause by the Kosovan courts or tribunals should follow the same principles followed by the courts and tribunals referred to in this paper.

Among others, this paper will analyze the way an arbitration clause is interpreted by the courts in the U.S., namely, how the courts interpret incomplete arbitration clauses in light of Sections 1 and 2 of the Federal Arbitration Act. Generally, the courts in the U.S. follow a policy that heavily favors arbitration where there is an arbitration clause entered into by the parties. In fact, this policy is so widespread within the U.S. that many authors question whether it is the most fair and the most equitable policy since it may run afoul of basic

[3] *See* Thomas Stipanowich, Contract and Conflict Management, 2001 Wis. L. Rev. 831, 834 (2001), cited by Moses, Margaret L., Drafting the Arbitration Agreement (March 14, 2012). PRINCIPLES AND PRACTICES OF INTERNATIONAL ARBITRATION, 2ND ED., Chapter 3, Cambridge University Press, 2012; Loyola University Chicago School of Law Research Paper No. 2012-003. Available at SSRN: http://ssrn.com/abstract=2022464

[4] Shaun Lee, Singapore International Arbitration Blog (2013), available at http://singaporeinternationalarbitration.com/2013/03/08/pathological-arbitration-clauses/

[5] As mentioned below, the New York Convention enumerates the main elements of an arbitration clause.

[6] Law No. 02/L-75 on Arbitration. Official Gazette of the Republic of Kosovo No. 37, dated 10 September 2008. Available at: http://gzk.rks-gov.net/ActDetail.aspx?ActID=2579

contract law principles.[7] International practice in this field is a bit more diverse, but similarities to the U.S. courts are still obvious.

While the main purpose behind this policy was to place arbitration clauses on equal footing with other contracts[8] the federal and state courts in the United States have transformed arbitration clauses into "super contracts" by using special interpretation rules for arbitration clauses that do not apply to other contracts. The reason for this, is the Supreme Court's determination that the Federal Arbitration Act embodies a federal policy favoring arbitration. [9] In this respect, in order to provide a more comprehensive view of the interpretation of arbitration clauses in the United States and to shed more light on their status as "super contracts," I will analyze whether the courts take a different approach when interpreting other contract clauses as opposed to arbitration clauses. Namely, I will consider the *contra preferentem* doctrine and its application in the context of arbitration clauses as opposed to other contractual clauses. I will demonstrate that arbitration is favored even when an unclear arbitration clause is drafted by the party which requests arbitration. Moreover, the courts in the U.S. employ a standard of proof in order to establish the waiver of the right to arbitrate which is much higher than the waiver standard for other contractual clauses. Specifically, in order to waive an arbitration clause, a party has to show prejudice to the opposing party, while for other contractual clauses a waiver depends on the intent of the waiving party rather than detrimental reliance by the opposing party.[10]

Besides the interpretation offered by the United States jurisprudence, I will also analyze the way various international courts and tribunals interpret pathological arbitration clauses.

Finally, the conclusion of this paper suggests that the United States' practice and international practice share similarities

---

[7] Richard Frankel, The Arbitration Clause as Super Contract, 91 Wash. U. L. Rev. 531 (2014). Available at: http://openscholarship.wustl.edu/law_lawreview/vol91/iss3/4

[8] EEOC v. Waffle House, Inc., 534 U.S. 279, 293 (2002) ("The FAA directs courts to place arbitration agreements on equal footing with other contracts . . . .")

[9] *See* supra note 6.

[10] Id.

in interpreting pathological arbitration clauses. The prevalent policy is to favor arbitration even when the parties' agreement is not very clear and accurate.

1. Pathological Arbitration Clauses

When drafting a contract, once the commercial terms have been settled, the parties often are under the illusion that the most important part of their agreement is finished. In the wake of actually agreeing to the commercial terms of the contract the parties are reluctant to spoil the upbeat atmosphere and talk about an eventual dispute that may arise and the actual way to resolve it.[11] They, thus, usually leave minimum time limits for constructing a Dispute Resolution Clause (in our case an arbitration clause), ignoring its paramount importance to the contract. As this practice is constantly being followed, the Dispute Resolution Clause has come to being known as the "2 AM Clause". [12]

If we have a quick look at the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as the "**New York Convention**"), we could infer that the formal requirements for an arbitration clause to be a valid one are as follows:

a) The agreement should be in writing;
b) It should deal with existing or future disputes;
c) The disputes should arise in respect of a defined legal relationship, whether contractual or not;
d) The dispute should contain a subject matter capable of settlement by arbitration.

But, the mere fulfillment of the abovementioned requirements does not provide grounds for enforcement of a particular arbitration clause. The person drafting the agreement should endeavor to anticipate all relevant issues prior to the negotiation of the dispute resolution clause, and ensure that all provisions are clear and unequivocal. If not,

[11] Comparative International Commercial Arbitration, Lew, Mistelis, et al. (2003), at 165
[12] "International Arbitration Survey: Choices in International Arbitration", White & Case and Queen Mary University of London (2010), available at: http://www.wipo.int/export/sites/www/amc/en/docs/walker20012011.pdf

the clause may be "pathological" and consequently unenforceable or, at the very least, it will delay the whole process.

Pathological clauses come in many shapes and forms. However, for the purposes of this paper we will thoroughly scrutinize only the most common issues contained in an arbitration clause which may cause the clause to be pathological.

1.1 Ambiguous Clauses

An ambiguous clause is one where the parties' fail to clearly state their agreement to binding arbitration. As with every aspect of a contract, the arbitration clause is subject to the consent of both parties, and without such a clear consent the contract or the arbitration clause in our case is at risk of being void.

8 A typical example where such consent to arbitration is doubtful or blurry was found in the Canadian National Railway Co v. Lovat Tunnel Equipment Inc.[13] In this case, the parties had entered into an agreement for the purchase/sale of a tunnel boring machine which was used to construct a railway tunnel. Section 11 of the Agreement read as follows:

> "*The parties may refer any dispute under this Agreement to arbitration, in accordance with Arbitration Act of Ontario*."

When the claimant wanted to sue for $27,000,000 in damages, the respondent moved for a motion to stay the action to send the dispute to arbitration. According to the respondent, the word "may" could not be interpreted as "shall", and as such, according to the respondent, the parties may only send disputes to arbitration provided that they both first agree to do so. However, the Court of Appeals of Ontario did not agree and decided to refer the issue to

[13] *Canadian National Railway Co v. Lovat Tunnel Equipment Inc*. 3 Int ALR N-5, (1999), available at: http://arbitrationplace.com/digitallibrary/Ontario%20International%20Commercial%20Arbitration%20Act%20Cases/Section%208/Canadian%20National%20Railway%20Company%20v%20Lovat%20Tunnel%20Equipment%20Inc%201999%20CanLII%203751%20(ON%20CA).pdf

arbitration in accordance with the Arbitration Act. According to the court, such a clause is to be interpreted as giving the right to either party to elect to have a dispute referred to arbitration.[14]

Having said this, ambiguity resulted in the overturning of an arbitration agreement in the case HoogovensIjmuldenVerkoopantoor BV v. MV Sea Cattleya and Others[15]. In Hoogovens, the parties had a contract which, in Clause 24 states that "General Average and arbitration to be settled in Netherlands." According to the defendant, the parties must arbitrate since the aforementioned clause requires the parties to submit all the disputes arising in connection with the contract to arbitration in Netherlands[16]. In arguing its point, the respondent in this case cited *Oriental Commercial & Shipping Co. v. Roseel, N.V* [17]. In *Oriental*, the arbitration clause inserted by the parties in their agreements was also a pathological one. It only provided "*Arbitration: if required in New York City*." Irrespective of this, the court had decided that arbitration clauses must be broadly interpreted and had decided to refer the issue to arbitration.[18] However, the court in Hoogovens concluded that in the particular case, the parties failed to make an agreement in writing to arbitrate the subject in dispute. Therefore, lacking such an agreement, the court found that it had no jurisdiction to stay a federal action or to compel arbitration. According to the court, Clause 24 is "no more than an agreement that, if arbitration were to be conducted….it would proceed in Netherlands."[19]

Arbitration clauses become ambiguous also when the drafters of the arbitration clause want to apply to arbitration rules that are natural for a litigation proceeding. Arbitration and litigation are different proceedings in many areas, and the rules which suit one can sometimes not suit the other and, thus, cripple the whole proceedings. For example, the parties may provide that:

---

[14] Id.
[15] HoogovensIjmuldenVerkoopantoor BV v. MV Sea Cattleya and Others, 852 Fed Supp 6
[16] *Id.*
[17] Oriental Commercial & Shipping Co. v. Roseel, N.V (S.D.N.Y. 1985) 609 F. Supp. 75, 77
[18] Id.
[19] Id.

> *The arbitration will be conducted in accordance with the Federal Rules of Civil Procedure applicable in the United States District Court for the Southern District of New York, and the arbitrators shall follow the Federal Rules of Evidence.*

Applying litigation procedures to arbitration goes against core arbitration characteristics like neutrality, international recognition, time efficiency to name a few.

Another way this issue expresses itself in an arbitration clause is when the drafters provide for an expanded review of the arbitration award such as the following:

> *The award of the arbitrators may be reviewed for errors of fact and law by the United States District Court for the District in which the arbitration is held.*

In both cases, the arbitration clause mixes up the core values of arbitration with the core values of litigation and, as such, they risk to jeopardizing the arbitration clause as a whole.

An example where mixing both arbitration and litigation in an arbitration clause renders the whole clause void was encountered in a Swiss case where the clause read as follows:

> "In the event of disputes […] the parties agree in advance to have the dispute submitted to binding arbitration through The American Arbitration Association or to any other US court. The prevailing party shall be entitled to attorney's fees and costs. The arbitration may be entered as a judgment in any court of competent jurisdiction. The arbitration shall be conducted based upon the Rules and Regulations of the International Chamber of Commerce" [20]

The Swiss First Civil Law Court held that an arbitration clause must be interpreted like any other contract and it must contain a clear manifestation of the intent to arbitrate. This meant that the state courts should be excluded and that there should at least be a clear indication of what arbitral

[20] 4A_279/2010, Swiss First Civil Law Court (2010), available at: http://www.swissarbitrationdecisions.com/sites/default/files/25%20octobre%202010%204A%20279%202010.pdf

mechanism reflects the agreement of the parties. According to the court, the above-mentioned clause does not serve this cause and is therefore invalid.[21]

1.2 Reference to the wrong/ inexistent institution

The arbitration clause, as mentioned above, came to be known as the '2AM clause' since the attorneys tailoring the contract clauses, after agreeing the commercial terms, would just squeeze in a random arbitration clause without thinking too much about it. This describes the definition given to this sin by Townsend: "drafting an arbitration clause with insufficient attention to the transaction to which it relates."[22] Selecting a random clause and just inserting in the contract is never the ideal solution, because as Townsend again cites : "the key is to pay sufficient attention to the underlying transaction so that the arbitration clause can be tailored to the client's particular requirements and to possible disputes that may reasonably be anticipated."[23] This certainly requires more scrutiny and specific analysis from the attorneys tailoring the clause.

Even though references to inexistent institutions such as "Official Chamber of Commerce in Paris" or "Arbitration Court at the Swiss Chamber for Foreign Trade in Geneva" have the potential to render the whole clause invalid, courts have generally focused their efforts on keeping the arbitration agreement in force.[24] The Hamm Court of Appeals in Germany decided that an arbitration clause was fatally "pathological" and therefore void where it stated that "[The parties] shall proceed to litigate before the Arbitration Court of the International Chamber of Commerce in Paris with the seat in Zurich." According to the court, it was impossible to determine if the parties intended to submit to the ICC in Paris or to the Zurich Chamber of Commerce, both of which maintained permanent arbitral tribunals.[25]

---

[21] Id.

[22] John M. Townsend, "Drafting Arbitration Clauses: Avoiding the Seven Deadly Sins" Dispute Resolution Journal February –April 2003 (Volume 58 No. 1) pg. 3

[23] Id.

[24] Doak Bishop. R, "A Practical Guide for Drafting International Arbitration Clauses" (2000) *citing* *Societe Asland v. Societe European Energy Corporation*, Rev Arb 514 (1990) , pg. 18-19 available at: http://www.kslaw.com/imageserver/KSPublic/library/pdf/00000084.pdf

[25] Id.

In a similar case, the Swiss Federal Supreme Court had to assess the validity of an arbitration clause which provided as follows:

> *"In case of any disputes deriving from the [Sales] Contract, the parties agree that it should be competence of the Arbitration Court of the International Chamber of Commerce of Zürich in Lugano. The language of arbitration will be Italian. The law applied will be Swiss law"*

The disagreement arose between the parties as to the authority which is competent to administer and supervise the arbitration. Namely, the Appellant claims that the Zurich Chamber of Commerce is competent, while the Respondent claims that it should be the Arbitration Court of the International Chamber of Commerce in Paris.

In deciding the issue the Swiss Federal Supreme Court, among others, held that a pathological arbitration clause
12 does not automatically rule out arbitration. Namely, according to the Swiss Federal Supreme Court "[an] arbitration clause containing imprecise, incomplete, contradictory or erroneous indications as to the arbitral tribunal – a so called pathological clause does not cause the arbitration agreement to be invalid, to the extent that interpretation makes it possible to determine which was the arbitral tribunal the parties intended."[26] In light of this statement, the court finally held that the unclear arbitration institution "Arbitration Court of the International Chamber of Commerce of Zurich in Lugano" – must be understood as meaning that the institution called upon to administer the arbitration taking place in Lugano is the ICC Court of Arbitration in Paris.[27]

The previous case, leads us to see that a pathological arbitration clause which refers to an inexistent arbitral institution has potential to prolong the dispute resolution proceedings, increase the cost and what is more important,

[26] A._____, v. B._____ Ltd., 4A_376/2008. Swiss Federal Supreme Court (2008), available at: http://www.swissarbitrationdecisions.com/sites/default/files/5%20decembre%202008%204A%20376%202008.pdf

[27] Id.

resort the dispute resolution proceedings to an arbitration institution which may not be preferable to all the parties involved.

1.3 Over-specific arbitration clauses

An over-specific clause is one which is over-elaborated to the point that it gets hard to know the real intention of the parties. Sometimes, attorneys trying to cover more ground and leave fewer loop-holes in the contract insert extensive provisions. This usually happens in so called "escalation clauses" which try to solve eventual disputes by other means of ADR before going to arbitration.[28]
An example of over-specificity is shown below:

> *"All disputes in relation to the present contract shall be carried out by the arbitrators appointed by the International Chamber of Commerce sitting in Geneva in accordance with the arbitration procedure set forth in the Civil Code of France and Civil Code of Venezuela, with due regard for the law of the place of arbitration*"[29]

This clause would only work if the French and Venezuelan Civil Codes were congruent. Otherwise, it would put the whole process in jeopardy and cause significant delays in the proceedings.

The parties to the contract sometimes adjust the arbitral proceedings in a series of steps to which they assign a very short amount of time to be completed. "An overly strict time limit may have the unavoidable result that the arbitral tribunals' mandate expires before it is practically possible to conduct an international arbitration."[30]

In Belgian Enterprise v. Iranian Factory[31], the parties set a time period of three months for the arbitrators to issue an award from the date of the contract. This period could be

---

[28] Dominguez, L.A.G, "*Causes and Consequences of Faulty Arbitration Clauses" (2007)*, Revista Estudios Socio-Juridicos, julio-diciembre, ano/vol.9, numero 002, Bogota, Colombia, pp. 124.
[29] Id. *citing* Paris, ICC case 1321/1974
[30] Lawrence Craig, William Park & Jan Paulsson, International Chamber of Commerce Arbitration 46, § 9.08 at 165 (2d ed. 1990).
[31] Belgian Enterprise v. Iranian Factory, 7 Y.B. Com. Arb. 119, 120-21,124 (1983)

extended up to four times. However, one party ultimately refused to extend this period, and the arbitrators ruled that their mandate had expired.[32]

Clauses such as this one will be a "mission-impossible" for most arbitral tribunals, which may ultimately force the parties to resort to litigation.

1.4 Abusive clauses

Abusive clauses usually occur when one party tries to abuse its stronger position in the negotiations and imposes clauses which tilt to its own advantage while damaging the other party's rights.[33] It is advisable though, to resist this tempting move since the risk of it not being enforced is quite high. The case Hooters of America, Inc. v. Phillips, 173 F.3d 933, 938-939 (4th Cir. 1999)[34] is one of the most notorious cases in this context. In this case, the arbitration agreement between Hooters and its employees provided that the arbitration tribunal would consist of three members which would be chosen from a pool of arbitrators selected by Hooters. There was no requirement of impartiality or independence. Moreover, Hooters could amend the arbitration rules while the employee could not. The court finally claimed that the clause was so one-sided that it should be voided. In its decision the court stated that:

> *"The parties agreed to submit their claims to arbitration—a system whereby disputes are fairly resolved by an impartial third party. Hooters by contract took on the obligation of establishing such a system. By creating a sham system unworthy of the name of arbitration, Hooters completely failed in performing its contractual duty ... [and] also violate[d] the contractual obligation of good faith .... Hooters' ... performance under the contract was so egregious that the result was hardly recognizable as arbitration at all."*[35]

---

[32] *See* Doak Bishop R., supra note 14 at 19, *citing* Belgian Enterprise v. Iranian Factory, 7 Y.B. Com. Arb. 119, 120-21,124 (1983)

[33] See Dominguez, supra note 16 at 130.

[34] Hooters of America, Inc. v. Phillips, 173 F.3d 933, 938-939 (4th Cir. 1999)

[35] Id.

This case proves that apart from being unfair, abusive clauses can also have a boomerang effect on the party which drafted them.

2. Interpretation of "pathological" arbitration clauses by the courts in the United States versus international interpretation of the pathological arbitration clauses

2.1 The United States interpretation

The legislative history of the Federal Arbitration Act shows that the drafters' sole intention was to make arbitration clauses be treated like other commercial contracts.[36] Before the FAA, arbitration agreements were essentially unenforceable in federal court given that the courts would refuse to enforce contracts that took jurisdiction out of their hands and handed dispute resolution to private arbitrators.[37] The drafters of the Act did not want arbitration clauses to be unenforceable simply because of their status as arbitration clauses. Section 2, the main substantive provision of the Act, embodies this idea of unifying the law of arbitration agreements with the rest of the law of contracts. It states that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

U.S. federal law strongly favors arbitration, and thus, a presumption exists in favor of agreements to arbitrate under the Federal Arbitration Act.[38] This arbitration favoritism, however is mostly attributable to the United States Supreme Court case Moses H. Cone Memorial Hospital v. Mercury Construction Corporation.[39] In Moses H. Cone, the Supreme Court stated that the FAA represents "a liberal federal policy favoring arbitration" and further established that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration" notwithstanding any state

[36] See Frankel, supra note 5.
[37] Id.
[38] . In re MacGregor (FIN) Oy, 126 S.W.3d 176 (Tex. App. 2003) mandamus conditionally granted sub nom.In re Kellogg Brown & Root, Inc., 166 S.W.3d 732 (Tex. 2005) and opinion vacated in part, 174 S.W.3d 419 (Tex. App. 2005)
[39] Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 460 U.S. 1 (103 S.Ct. 927, 74 L.Ed.2d 765)

policies to the contrary.[40] As a result of this, the states have found it impossible to do anything with respect to protecting the rights of litigants to go to court since the Supreme Court has prohibited states from enacting laws applicable "only to arbitration provisions."[41] In Casarotto the Montana state court stayed the lawsuit of a franchisee towards a franchisor pending arbitration proceedings pursuant to the franchise agreement. However, the Montana Supreme Court reversed this decision since the arbitration clause was not underlined or typed in capital letters on the first page of the contract, as the law in Montana expressly required it. In addressing the franchisor's argument that the state law requirement was preempted by the Federal Arbitration Act, the Montana Supreme Court maintained that the state-law requirement does not undermine the Federal Arbitration Act's goals and policies since it "did not preclude arbitration agreements altogether."[42] However, as mentioned above, the Supreme Court of the United States held that the state-law requirement was in contradiction with the Federal Arbitration Act, since according to Justice Ginsburg, when it passed the Federal Arbitration Act, Congress "precluded states from singling out arbitration provisions for suspect status."[43]

The Supreme Court has also limited the possibility to challenge arbitration clauses based on their fairness by foreclosing unconscionability defenses to arbitration clauses.[44] In the famous AT&T case, following a class action lawsuit against it, AT&T moved to compel arbitration pursuant to the clause it had in its customer contracts. The U.S. Court of Appeals for the Ninth Circuit held that the arbitration clause was unconscionable and unenforceable under California law. The Supreme Court, however, in a 5-4 decision held that "state-law rules stand as an obstacle to the accomplishment of the FAA's objectives."[45]

In addition to this, the Supreme Court established that challenges to arbitration be decided by the arbitrator himself

[40] See Frankel, supra note 23
[41] *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)
[42] Id.
[43] Id.
[44] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011)
[45] Id.

rather than a court judge.[46] In the Buckeye case, the Supreme Court ruled that challenges to the legality of a contract as a whole must be argued before the arbitrator rather than a court. Justice Antonin Scalia explained that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." [47]

2.2 International Interpretation

Similar to what was said in the first section when illustrating different kinds of pathologies encountered in arbitration clauses, it can be deduced that the international practice of the courts with respect to the interpretation of pathological or defective arbitration clauses is much more heterogeneous than the practice of the U.S. courts. However, even in the midst of this heterogeneity, the general practice of the courts is to favor and keep the arbitration agreement between the parties in force. In Insigma Technology Co Ltd v Alstom Technology Ltd[48], the Court of Appeal of Singapore held that the concept of a "pathological clause" fulfils a descriptive function and not a prescriptive one. According to the court, "where the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars… so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party."[49] The court in Singapore, thus, relied in the principle of effective interpretation and cited Fouchard, Gallard and Goldman[50] "where a clause can be interpreted in two different ways, the interpretation enabling the clause to be

[46] Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006)
[47] Id.
[48] Insigma Technology Co Ltd v Alstom Technology Ltd [2009] 3 SLR 936; [2009] SGCA 24, available at: http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/court-of-appeal-judgments/13850-insigma-technology-co-ltd-v-alstom-technology-ltd-2009-3-slr-936-2009-sgca-24
[49] Id. at par. 31
[50] Fouchard, Gaillard, Goldman on International Commercial Arbitration (Kluwer Law International, 1999) (Emmanuel Gaillard & John Savage eds), at p 258

effective should be adopted in preference to that which prevents the clause from being effective."[51]
In System for International Agencies v. Rahul Coach Builders Pvt. Ltd.[52], the parties had agreed to arbitrate but had established two sources of governing law, the "by-laws of Indian Company's Act 1956" or "International Trade Laws." Finding itself in the midst of this unclear and ambiguous language, the Supreme Court of India ultimately held that there was no agreement to arbitrate at all.[53]

In other cases, the courts have separated the pathological part of the clause from the part which provides for a resolution of disputes through arbitration and, in doing so, have found a way to keep the valid part of the arbitration clause in force. In Lucky Goldstar International (HK) Ltd. v. Ng Moo Kee Engineering Ltd[54]. the dispute resolution clause provided as follows:

> "*Claims: Any claims by the buyer of whatever nature arising under this contract shall be made by cable within thirty (30) days after arrival of the merchandise at the destination specified in the bills of lading. Full particulars of such claim shall be made in writing and forwarded by registered mail to the seller within fifteen (15) days after cabling. The buyer must submit with such particulars sworn surveyors' reports when the quality or quantity of merchandise delivered is in dispute. Any dispute or difference arising out of or relating to this contract, or the breach thereof which cannot be settled amicably without under delay by the interested parties shall be arbitrated in the third country, under the rules of the third country and in accordance with the rules of procedure of the International Commercial Arbitration Association. The award shall be final and binding upon both parties*."

Even though the parties agreed to resolve their disputes with a non-existent association, "International Commercial Arbitration Association," the High Court of Hong Kong severed the pathological part of the clause and kept the other

[51] Id.
[52] System for International Agencies v. Rahul Coach Builders Pvt. Ltd. (2014), available at: http://indiankanoon.org/doc/68847411/
[53] Id
[54] Lucky Goldstar International (HK) Ltd. v. Ng Moo Kee Engineering Ltd (1993) Available at: http://neil-kaplan.com/wp-content/uploads/2013/08/Lucky-Goldstar-International-HK-Limited-v-Ng-Moo-Kee-Engineering-Limited-HCA94-of-1993.pdf

part in force by referring the parties to arbitration in accordance with the laws of the seat of arbitration chosen in their arbitration clause.

The desire of the courts to hold arbitration agreements in place has pushed them to find creative solutions. In Pricol Ltd. v. Johnson Controls Enterprises Ltd. [55] for example, the Supreme Court of India referred the parties to arbitration under the arbitration rules of the Singapore International Arbitration Centre even though the parties had provided for reference to arbitration under the arbitration rules of Singapore Chamber of Commerce. Although there was no such arbitral institution, the Supreme Court construed the reference in the arbitration clause to mean the Singapore International Arbitration Centre.

3. Interpretation of other contract clauses

19 As stated above, the arbitration favoritism of the courts in the United States has been shown through the interpretation of ambiguous contracts in favor of arbitration rather than through interpretation based on the traditional contract law doctrine also known as *contra preferentem* doctrine or "interpretation against the draftsman." Although courts apply contra preferentem to all types of standard-form contracts and, thus, holding that the preferred meaning should be the one that works against the interests of the party who provided the language of the provision, arbitration agreements have a different, if not favorable, treatment. In Kristian v. Comcast Corp.[56] the court held that "[w]here the federal policy favoring arbitration is in tension with the tenet of contra preferentem for adhesion contracts, and there is a scope question at issue, the federal policy favoring arbitration trumps the state contract law tenet." Similarly, a North Carolina court held that, while in ordinary circumstances, state law specifies that ambiguity in contract language is construed against the drafter, since the ambiguity occurred in the context of an arbitration clause,

[55] Pricol Ltd. v. Johnson Controls Enterprises Ltd Available at: http://indiankanoon.org/doc/168474344/

[56] Kristian v. Comcast Corp., 446 F.3d 25, 35 (1st Cir. 2006)

the ambiguity must be resolved in favor of arbitration."[57] This practice allows a drafting party to enforce an ambiguous arbitration clause even though, if this was another contract clause, the court would adopt a contrary interpretation of the contractual term. In fact, this is further exacerbated when the courts find the ambiguity to be dispositive, thus sending a dispute to arbitration primarily because the agreement was unclear as to whether the dispute belonged in arbitration.[58]

Secondly, the creation of specific rules rendering it more difficult to waive arbitration provisions than other contractual terms provides yet another difference in the interpretation of the arbitration clause versus other contractual clauses.[59] When it comes to arbitration agreements, most courts treat waiver differently from other contracts. In addition to the requirement that a party act inconsistently with its right to arbitrate (by instituting or participating in litigation rather than seeking to compel arbitration), the vast majority of courts also require prejudice, which means that such action must materially harm the other party.[60]

4. CONCLUSION

Based on the analysis given above, one thing is abundantly clear, that in each and every case, more effective drafting skills on the part of practitioners would have avoided the confusions and disputes over the arbitrability of the issues would not have surfaced in the first place. Except for particularly severe cases of poor drafting, courts in the U.S generally tend to overlook minor drafting issues in favor of upholding the parties' intention to arbitrate. U.S. federal law strongly favors arbitration, and thus, a presumption exists in favor of agreements to arbitrate under the Federal Arbitration Act. As a result of this, courts tend to resolve any doubts about an arbitration agreement's scope in favor of arbitration.

[57]See Frankel, supra note 5, at 556
[58]See Kristian, supra note 45, at. 35-36.
[59]See Frankel, supra note 5.
[60]See Walker v. J.C. Bradford & Co., 938 F.2d 575 (5th Cir. 1991).

A similar approach is also taken at the international level. Courts have gone to great lengths to show their preference for favoring arbitration over litigation when an arbitration clause was present. This approach is evidenced in a plethora of cases from various and vastly distinct jurisdictions.

Despite this arbitration-friendly approach employed in the U.S. and International courts and tribunals, the drafters of commercial contracts should still pay close attention when drafting and tailoring arbitration clauses. Arbitration is known and usually chosen for, its already-proven effectiveness and fast-paced proceedings. As such the parties do not want to waste their time and resources dealing with unnecessary delays and obstacles in times when even the smallest of expenses, in both time and money, might be crucial to the company. In this respect, avoiding the issues described above is strongly recommended and may be a good start in the way to prevent of lengthy and contentious procedures to interpreting the actual meaning of the parties writing.

Considering that arbitration is a creature of the parties' intent to settle disputes in an extra-judicial forum, it is only right that the courts and tribunals adopt a lenient approach when dealing with pathological arbitration clauses and use their best endeavors to extract the parties' main idea to arbitrate, not litigate.

UDC 341.63

Dutco Revisited: An Institutional Analysis of the Appointment Process of Arbitrators in Multi-Party Cases

Petrit Elshani* and Arnis Dumani**

Abstract

Administering multiparty arbitration proceedings is one of the most complex tasks that arbitral institutions face today. The appointment process of party-appointed arbitrators is an area of particular controversy in this regard. The reason for this are the possible tensions that may arise between, on the one hand, party autonomy (i.e. the right to appoint one's 'own' arbitrator) and, on the other hand, the absolute requirement of equality between the parties. This can become problematic in cases when there are multiple parties either on claimant's or on respondent's side, who have to agree on a joint arbitrator.

The Dutco decision is a landmark case decided by the French Cour de cassation, in which precisely these conflicts were highlighted.

In response to the Court's findings in this case, which will be discussed in detail in this paper, leading arbitral institutions worldwide began to adapt their standard approach in cases when multiple parties on the same side of the dispute were required to jointly nominate one arbitrator. This paper will examine the new approaches adopted by institutions in some of the main arbitral venues worldwide.

Additionally, an emphasis will be put on the 2011 Arbitration Rules of the Arbitration Center of the American Chamber of Commerce in Kosovo, which also contain a provision dealing with this issue. Parallels will be drawn between the various institutional rules and possible discrepancies will be underlined in the course of this paper, which will end with a set of conclusions and proposals.

I. Introduction

International commercial transactions and projects in today's globalized and digitalized business environment have given rise to more complex arbitrations than merely, for instance, one buyer asserting a claim against one seller. Official numbers of the International Court of Arbitration[1] (*'ICC Court'*) of the International Chamber of Commerce (*'ICC'*) show that 275 multi-party cases were filed in 2015, *"representing a record 30 % of all new cases"*.[2] The average number of parties in a multi-party case was 4, while the largest multi-party case involved 31 parties.[3] Under the Arbitration Rules of the Swiss Chambers' Arbitration Institution (*'Swiss Rules'*) on the other hand, 28 % of all cases recorded from 2004 were multi-party cases.[4]

As a corollary of this, in practice, it is by now frequently the case that there are multiple parties either on the side of claimant or on the side of respondent, sometimes even on both sides. Besides this, there may also be multiple claims and multiple contracts involved. This can be a problematic scenario and raises many legal questions, one of which relates to the right to appoint one's own arbitrator, which is not only regularly brought up as one of arbitration's greatest advantages, but is also a basic right of each and every party

---

**PetritElshani studied law at the University of Prishtina and the Free University of Berlin. He is currently in the final stages of his LL.M. studies in International Dispute Resolution (with a focus on International Arbitration) at the Humboldt-University in Berlin. Alongside this academic facet, he is working for WAGNER Arbitration, one of the leading boutique arbitration firms in Germany, where he has been engaged in ICC, DIS and GMAA proceedings and various cross-border business transactions. Mr. Elshani is also a member of the Young Arbitration Practitioners Group (‚DIS40') of the German Institution for Arbitration.*

*** Arnis Dumani is a lawyer from Prishtina, admitted to the Kosovo Bar as an Attorney at Law in 2015, currently working at Judex Law Firm in Prishtina. In the past, he worked as a legal researcher at the Lawyer's Association Norma and an intern in a Public Notary Office. He represented the University of Prishtina in various international competitions, including the Willem C. Vis International Commercial Moot Court Competition, the International Chamber of Commerce Mediation Competition, and served as an assistant coach of the team participating in the International Criminal Moot Court Competition.*

[1] The ICC Court is the independent arbitration body of the ICC. For a more detailed view of its role and functions, see Art. 1 of the ICC Rules.

[2] ICC Dispute Resolution Statistics, 2015, an overview of which is available at: http://www.iccwbo.org/News/Articles/2016/ICC-Arbitration-posts-strong-growth-in-2015/, accessed on: 13 October 2016.

[3] *Ibid.*

[4] ZUBERBÜHLER, MÜLLER & HABEGGER, Swiss Rules Commentary, 2013, at 110.

to an arbitration proceeding, embodied in virtually all arbitration laws and rules around the globe. Whereas, in a scenario such as the one described above, the multiple parties on either side would have to, in a way, *share* an arbitrator and agree on someone they possibly do not fully endorse for the respective arbitration proceeding, thereby fundamentally affecting that basic right. The question, whether this is permissible and whether arbitral institutions can impose this obligation upon the parties, to agree on an arbitrator, continues to be discussed.

Challenge and enforcement proceedings looming in the background add a further layer of complication to this constellation. Bearing this in mind, an even higher degree of attention must be extended to the composition of the tribunal in cases where the award is to be recognized and enforced in a country other than the country where the arbitration took place. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*'the New York Convention'*)[5] stipulates the improper constitution of the arbitral tribunal as one of the grounds for the refusal of the recognition and enforcement of a foreign arbitral award. This is provided for in Art. 5 (d) of the New York Convention, which, more specifically, states that the recognition and enforcement of an award may be refused if the *"composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties"* or *"was not in accordance with the law of the country where the arbitration took place"*.[6] Hence, any such nomination procedure can lead to a refusal of the recognition and enforcement of the foreign arbitral award.

Practically, and if we think of the arbitral procedure as a multi-step process, the question that will be dealt with here appertains to the second arbitral step, once questions regarding *consent,* the validity of the arbitration agreement

[5]The New York Convention was adopted in 1958 and by now has 156 contracting parties (Status on 16 October 2016). It requires its contracting parties to give effect to private arbitration agreements between parties and to enforce arbitral awards made in other contracting states.

[6] New York Convention, Art. V (d), available at: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf, accessed on: 15 October 2016.

and whether all parties are bound by it are brushed aside and the arbitral tribunal is about to be constituted.

The findings of the Dutco case, which will continuously serve as a point of reference during the analysis conducted in this thesis, were the first that unveiled these fundamental issues and their inter-connectedness with some of the core principles of international commercial arbitration, such as equality between the parties, party autonomy and the concept of *public policy*.[7] How arbitral institutions have reacted in the aftermath of this case, more specifically whether they have conformed to it or not, is the main subject of this paper. It attempts to, firstly, highlight the theoretical and legal issues inherent to such multi-party constellations through the example of the Dutco case. As a second step, an examination of the approaches that some of the major arbitral institutions employed in this regard via their arbitration rules will take place. The Rules of the following arbitral institutions will be examined:

1. 2012 Arbitration Rules of the International Chamber of Commerce (*'ICC Rules'*);
2. 2013 Rules of Arbitration of the Vienna International Arbitral Centre (*'VIAC Rules'*);
3. 2012 Rules of International Arbitration of the Swiss Chambers' Arbitration Institution (*'Swiss Rules'*);
4. 2014 Rules of Arbitration of the London Court of International Arbitration (*'LCIA Rules'*);
5. 2011 Arbitration Rules of the Arbitration Center of the American Chamber of Commerce in Kosovo (*'Kosovo Rules'*).

These institutions were chosen as they contain some of the most modern and elaborate sets of rules on multi-party arbitrations that parties can currently refer to. The main reason for this is that they were adopted recently, recognizing the growing complexity of international commercial disputes. Besides that, these institutions also account for a very large chunk of market share in the sphere of international arbitration. Bearing this in mind, these rules are representative of the global trend regarding the mechanisms dealing with the appointment process of arbitrators in multi-

[7] For a more in-depth discussion on the concept of public policy, see Gary Born, International Arbitration 2nd Ed., 2015, at 2729.

party cases and can be utilized as a blueprint for the purpose of the analysis contained in this paper. Additionally, the Kosovo Rules will be examined in this context to draw a comparison to the aforementioned institutions in terms of how the appointment process of multi-party arbitrations is dealt with and whether a Rules revision is necessary and/or could be a useful tool to enhance its attractiveness for users.

II. The Dutco Issue

A. Pre-Dutco: Brief Background

In a *usual* scenario, both claimant and respondent are entitled to select and nominate an arbitrator themselves. This is one of the central features of arbitration and one of the main reasons that it is chosen as a dispute resolution mechanism. It gives the parties the opportunity to select someone who will presumably speak the same language and share the same cultural background and tradition, thus increasing their level of trust and confidence in the arbitral process. However, considering the increasing business complexity often accompanied by back-to-back transactions with multiple parties all around the globe, the *usual* scenario has in fact become rather unusual in practice. And this is precisely where problems arise when there are, as described before, two or more parties on either side of the dispute.

The traditional approach by arbitral institutions with regards to the problem described in the preceding paragraphs was that either the group of claimants or the group of respondents would have to agree on a jointly nominated arbitrator. At this point, it must be clarified though that this sort of complication will rarely surface on the claimant's side, as the claimants will usually have aligned interests and will have initiated the arbitration jointly in the first place, being aware of the fact that they have to agree on a *shared* arbitrator. This does not hold true for the respondents, who may very well have conflicting interests and who in many cases are caught off guard when one and the same arbitration is initiated against a larger group of them.

Should the parties then fail to agree on a joint nomination, they would be considered in default and the standard

approach was that the institution would carry though a substitute appointment only for the group of parties in default. The difficulty with this approach was that, arguably, it could be considered to extend a preponderant influence on the tribunal to one of the parties, which could by itself nominate an arbitrator while the multiple parties on the opposing side would have a lesser role by being deprived of the right to select their *own* arbitrator. This could be seen to amount to a violation of the equal treatment principle, which is problematic from an enforceability perspective, as inequality between the parties in the proceedings is considered one of the reasons for which recognition and enforcement of an award can be refused on grounds of *public policy*. A significant shift to this practice occurred subsequently to the decision of the French *Cour de cassation* in the BKMI Indutrieanlagen (*'BKMI'*)/ Siemens AG (*'Siemens'*) v. Dutco Construction Company (*'Dutco'*)case[8], which has been rated as *"one of the most influential and commented-upon contributions to date on the subject of constituting arbitral tribunals in multiparty arbitration"*.[9]

B. The Case and its Findings

In a nutshell, the facts of the *Dutco* case were as follows: BKMI had entered into what is referred to as a *silent consortium agreement* with Siemens and Dutco for the purpose of constructing a cement plant in Oman. The companies, via this tripartite agreement, would be responsible for the execution of different parts of the construction work, while BKMI would be accountable towards the employer and the owner of the project, a company from Oman. Soon thereafter, a dispute arose concerning certain failures in the performance of the contract on the part of the German companies, Siemens and BKMI, as alleged by Dutco. On this basis, Dutco, asserting claims for payment of various sums, initiated arbitral proceedings against the other two members of the consortium under the ICC Rules, as the consortium

[8]Cour de Cassation, Sociétés BKMI Industrieanlagen et Siemens AG v. Société Dutco Construction Company, 7 January 1992, YCA Vol. XVIII (1993), at 140 et seq.

[9]UGARTE & BEVILACQUA, Ensuring Party Equality in the Process of Designating Arbitrators in Multiparty Arbitration: An Update on the Governing Provisions, Journal of International Arbitration, Vol. 27 Issue 1, 2010, at 9.

agreement had provided for arbitration with a three-member tribunal appointed in conformity with the ICC Rules. The seat of the arbitration was set to be Paris.

Siemens and BKMI were in disagreement as regards the nomination of an arbitrator. They argued that they could not be forced to agree on one and that Dutco should have instituted separate proceedings against the two of them, as the claims brought against them were distinct, the factual basis was dissimilar and their commercial and legal interests were not aligned either. Nevertheless, after having challenged the Request for Arbitration and only under protest, the parties did make a joint nomination after the ICC requested them to do so in accordance with its standard practice at the time. Subsequent to the rendering of the interim award on jurisdiction by the arbitral tribunal in this proceeding confirming that it had been properly constituted, BKMI and Siemens initiated setting aside proceedings (*"recoursen annulation"*) before the *Cour d'appel* of Paris on grounds of the improper constitution of the arbitral tribunal and a violation of international *public policy*.

The *Cour d'appel* in fact confirmed the tribunal's interim award, as it found, *inter alia,* that the fact there were multiple parties to the consortium agreement, and consequently to the arbitration agreement, implied the future possibility that two out of the three parties may be on either side of claimant or respondent, in a position in which they would be requested to jointly agree on one arbitrator.[10] Furthermore, by referring all possible disputes to arbitration under the ICC Rules, which contains mechanisms addressing multi-party constellations, the court found that the parties had accepted this possibility as *"a natural consequence"*.[11] According to the court, the appointment of only one arbitrator by the respondents resulting out of their *"situation of forced association"*[12] did not limit their ability to defend themselves in the proceedings. As a result, the *Courd'appel*concluded that there was no imbalance between the parties regarding their right to appoint an arbitrator and therefore a violation

[10]Cour d'appel of Paris, Sociétés BKMI Industrie anlagen et Siemens AG v. Société Dutco Construction Company, 5 May 1989, YCA Vol. XV (1990), at 124 et seq.
[11]*Ibid.*, at 125.
[12]*Ibid.*, at 126.

of the due process requirement and *public policy* did not occur.

The *Cour de cassation* however reversed the decision of the *Cour d'appel* of Paris and annulled the award, by indeed holding that the tribunal had not been properly constituted and that the right of a party to nominate an arbitrator in a given arbitration proceeding is of such paramount importance that it amounts to a *public policy* violation if it is deprived of this right. Consequently, it raised the equal treatment of the parties in this respect to the level of *public policy*.[13] As a conclusion, the Court held that any agreement providing for differing and unequal models of participation of the parties in the constitution of the arbitral tribunal violates *public policy* and invalidated advance waivers hereof.

As will be described in the following sections of this paper, this decision had a profound impact on the world of international arbitration.

29

III. Post-Dutco: The Institutional Rules

As a reaction to the *Dutco* decision and the findings of the *Cour de Cassation*, arbitral institutions worldwide started to adopt new rules addressing multi-party scenarios, wary of the detrimental effects this may have on awards rendered under their rules. The following paragraphs will illustrate how this was done and what the position of the Kosovo Rules is in this regard.

A. The ICC Rules

The ICC revised its rule on the appointment process of arbitrators in multi-party arbitrations into what is now Art. 12 (8) of the 2012 ICC Rules:

> *"8 In the absence of a joint nomination pursuant to Articles 12 (6) or 12 (7) and where all parties are unable to agree to a method for the constitution of the arbitral tribunal, the Court may appoint each member of the arbitral tribunal and shall designate one of them to act as president. In such case,*

[13] *supra* note 8

> *the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 13 when it considers appropriate."*

The basic rule that is spelled out in Art. 12 (6) of the 2012 ICC Rules is that multiple parties on either side of the dispute are, in principle, required to jointly nominate one co-arbitrator in accordance with the procedure set out in Art. 13 of the Rules. In practice, difficulties will in most cases arise in relation to multiple respondents for the reasons mentioned before. Multiple claimants will presumably only bring a claim together against one or multiple respondents if they also agree to act alongside each other in the nomination procedure of the arbitrator.[14] In any other case, they always have the possibility to initiate separate arbitral proceedings.[15] While multiple respondents may very well have non-aligned, even conflicting interests in a given arbitration proceeding. For instance, if one of the respondents is an Indian enterprise while the other one is an Austrian enterprise, the decision whether to nominate a common law lawyer or a civil law lawyer may be heavily discussed, in particular if the parties do not have corresponding interests.[16]

30

The post-*Dutco* altered provision of par. 8 of Art. 12 only comes into effect once two conditions are fulfilled: (1) the multiple claimants or respondents must have failed to agree on a joint nomination of a co-arbitrator within the given time-frame and pursuant to par. 6 and 7 of Art. 12, and (2) the parties also must have failed to agree on an alternative method to compose the tribunal.[17] Whereas the first condition is drafted in a way to cover situations in which either the respondents or the claimants or, indeed, both sides are unable to agree on a joint nomination; the second condition re-confirms the primacy of party agreement.[18] If these conditions are fulfilled, then the default mechanism of Art. 12 (8) of the ICC Rules is applicable, which takes the appointment process of the arbitrators out of the hands of the parties.

---

[14]SCHUTZE, Institutional Arbitration Commentary, 2012, at 80.
[15]*Ibid.*
[16]WEBSTER & BUHLER, *Handbook of ICC Arbitration*, 2014, at 207.
[17]*Ibid.*, at 207, 208.
[18]*Ibid.*, at 208.

This provision provides that, in these cases, the ICC Court *"may"* appoint all of the arbitrators, contrary to the pre-*Dutco* rule, which, in a way, forced the parties to agree on an arbitrator against their will. As can be observed, a certain amount of discretion is however still left to the ICC Court in this regard, whether it will appoint the entire tribunal or whether it will only appoint the arbitrator for the group of parties that cannot reach an agreement on a joint arbitrator.[19] Its decision on this will be case-specific and fact-specific and will in particular take into consideration whether the multiple parties on either side have conflicting or correlating interests.[20] It is therefore also conceivable that the ICC Court will confirm the arbitrator nominated by the claimant and only appoint the arbitrator for the respondent's side, who cannot agree on a joint nomination, or vice versa, when it is manifest that the parties have aligned interests.[21] One more important aspect that must also be taken into consideration in this context is the law of the place of arbitration and the place of enforcement. When either of these places are situated in countries, which, in their legal thinking, have not adopted the *Dutco* doctrine as set forth by the *Cour de cassation* in its judgment of 7 January 1992, the ICC will be less likely to appoint the entire tribunal, while disregarding the nomination made by the non-defaulting party.[22]

Through the mechanism described, the ICC has attempted to address the concerns raised by the *Cour de cassation* in the *Dutco* case. Under the current rule, both sides are deprived of their right to select and nominate an arbitrator and thereby equality is restored between the parties. As Schütze puts it, *"all are treated equally, but equally badly"*.[23] It must be noted however that the revised ICC Rules have introduced this novelty, which is legally unobjectionable viewed in particular from the prism of the *Dutco* case, while still maintaining a degree of flexibility when considering all relevant circumstances of a particular case.

---

[19] *supra* note 16, at 208.
[20] *Ibid.*
[21] *Ibid.*
[22] *supra* note 14, at 82.
[23] *Ibid.*, at 381.

B. The VIAC Rules

On the same issue, the 2013 VIAC Rules contain an interesting feature in Art. 18 (4):

> *"(4) If pursuant to paragraph 2 of this Article a joint arbitrator is not nominated within the time period, the Board shall appoint the arbitrator for the defaulting party/parties. In exceptional cases, after granting the parties the opportunity to comment, the Board may revoke appointments already made and appoint new co-arbitrators or all arbitrators."*

The general rule enshrined in Art. 18 (4) of the 2013 VIAC Rules is that in the event that either multiple claimants or multiple respondents fail to agree on a joint nomination of an arbitrator, the VIAC Board[24] can then make a substitute appointment on behalf of the party in default, without interfering with the right of the non-defaulting party to appoint its arbitrator.[25] As an exception to this general rule however, and as a significant modification to the previous 2006 VIAC Rules, the Board also has the authority, *"in exceptional cases"* and *"after granting the parties the opportunity to comment"*[26], to revoke nominations which have already been made and to appoint one or more of the co-arbitrators or even the entire tribunal itself.[27] This, as already stated, represents a major departure from the previous version of the VIAC Rules, which, in complete disregard of the decision of the *Cour de cassation*, did not contain any of the *Dutco*-esque adjustments that other institutions had made.[28]

[24]The VIAC Board is one of the two executive entities, through which the Vienna International Arbitral Centre operates. For a more in-depth view of its role and functions, see Art. 2 of the VIAC Rules.

[25]SCHWARZ & KONRAD, *The Revised Vienna Rules: An Overview of some Significant Changes and a Preview of the new Austrian Arbitration Law*, ASA Bulletin, Vol. 31 Issue 4, 2013, at 805.

[26]2013 VIAC Rules, Art. 18 (4).

[27]*supra* note 25.

[28]It seems that after initial consideration within the Austrian legal community not to adopt the findings of the *Cour de cassation* in the *Dutco* decision, the Viennese Arbitral Centre has now adjusted its position and does provide for a stepping-in mechanism by the institution. The previous rule in the VIAC Rules 2006 stipulated the following in Art. 15 (7): *"If no arbitrator is jointly nominated within the period mentioned in paragraph 6 of the*

As is evident, the VIAC Rules also provide for flexibility, similarly to the ICC Rules. Contrary to the ICC Rules however, the standard approach under the VIAC Rules is that only the side in default is deprived of its right to appoint an arbitrator. The Board nonetheless has the power, in cases when this is considered fair and equitable, to appoint the co-arbitrator of the other side as well or indeed the entire tribunal.[29] The crucial point that must be underlined again here are the possibly divergent interests between the parties.[30] When their interests are of such nature that the parties cannot be expected to agree on a joint nomination, the Board will be inclined to appoint the entire tribunal.[31]

C. The Swiss Rules

To address the case that a group of parties on either side fails to designate an arbitrator, the Swiss Rules of International Arbitration have provided a similar mechanism to the ICC Rules. Art. 8 (5) of these rules also enables the Court[32], but does not oblige it, to appoint the entire tribunal:[33]

33

> *"5. Where a party or group of parties fails to designate an arbitrator in multi-party proceedings, the Court may appoint all of the arbitrators, and shall specify the presiding arbitrator."*

As a first step however, recognizing the primacy of party autonomy, the Swiss Arbitration Institution will conform to the agreement of the parties as regards the appointment process. Consequently, the multiple parties on either side of the dispute are encouraged to agree on a joint nomination. If

---

*present Article and if the dispute is to be decided by an arbitral tribunal, the Board **shall** appoint the arbitrator for the **defaulting Respondents**". (Emphasis added)*

[29]*supra* note 25, at 806.

[30]*Ibid.*

[31]*Ibid.*

[32]The Arbitration Court of the Swiss Chambers' Arbitration Institution is the central executive body of the SCAI. For a more in-depth analysis of its role and functions, see the Introduction to the SCAI Rules, available at: https://www.swissarbitration.org/files/33/Swiss-Rules/SRIA_english_2012.pdf, 29 June 2016.

[33]*supra* note 4, at 120.

this is not feasible, the Court may proceed by appointing the entire tribunal.[34]

Similar factors will come into play here as in the case of the ICC Rules and a case-by-case analysis will influence the decision of the institution. The institution will in most cases refrain from depriving the non-defaulting side from its right to nominate a co-arbitrator if this does not risk the enforceability of the eventual award and if the law at the place of arbitration is not in contradiction with this.[35] This once again confirms the pragmatic nature of the approach that arbitral institutions have decided to adopt.

Within this framework however, it must be noted that the number of national arbitration laws that do contain specific provisions on how to deal with the modalities of the constitution of the tribunal in multiparty scenarios are significantly outnumbered by those that do not.[36] Against this backdrop, the importance of institutional arbitration rules steps to the forefront on the second normative layer, after the mandatory rules of the *lex loci arbitri.*

D. The LCIA Rules

The LCIA Rules tackle the issue of the appointment process of arbitrators in multiparty cases in the *Dutco*-inspired Art. 8.1 and. 8.2:

> *"8.1 Where the Arbitration Agreement entitles each party howsoever to nominate an arbitrator, the parties to the dispute number more than two and such parties have not all agreed in writing that the disputant parties represent collectively two separate "sides" for the formation of the Arbitral Tribunal (as Claimants on one side and Respondents on the other side, each side nominating a single arbitrator), the LCIA Court shall appoint the Arbitral Tribunal without regard to any party's entitlement or nomination.*

[34] *supra* note 14, at 381.
[35] *supra* note 4, at 121.
[36] For a more detailed analysis of the national arbitration laws addressing this issue, *see supra* note 9, at 24 et seq.

> *8.2 In such circumstances, the Arbitration Agreement shall be treated for all purposes as a written agreement by the parties for the nomination and appointment of the Arbitral Tribunal by the LCIA Court alone."*

As a deviation from many other institutional arbitration rules that are available to users today, the LCIA Rules have taken a particularly cautious approach.

The basic position under the relevant Article of the LCIA Rules is that none of the parties on either side have *"an automatic right to nominate an arbitrator".*[37] Much rather, the right to appoint an arbitrator is made contingent upon the conclusion of an agreement between all the parties involved in the proceeding that they represent no more than two disputing sides for the purpose of the tribunal's constitution.[38] Whether this agreement must be reached before or after the dispute has arisen is unclear and left open. Contrary to the decision of the *Cour de Cassation* in the *Dutco* case however, which suggested that waiver agreements of this nature may only be reached after the dispute has arisen, the LCIA Court in fact also accepts and respects them if they are made prior to the coming into existence of the dispute.[39] This is in fact a feature of the *Dutco* decision, which has generally not been taken up by arbitral institutions. Institutions may, and in fact do, as we can see through this example, give effect to pre-dispute agreements setting forth appointment methods, which may be viewed as discrepant.

35

Should this party agreement not be forthcoming, the LCIA Court will appoint the entire tribunal, and in doing so, will disregard any nomination already made by one of the sides in the dispute. As this may be seen as an overriding encroachment on party autonomy, under point 2 of Art. 8, the rules also stipulate that, in the absence of an agreement that they collectively represent two separate sides, the arbitration agreement *"shall be treated for all purposes as a written agreement by the parties for the nomination and appointment of the Arbitral Tribunal by the LCIA Court Alone".*[40] The rationale behind the inclusion of such a

[37]WADE, CLIFFORD & CLANCHY, *A Commentary on the LCIA Arbitration Rules*, 2015, at 97.
[38]*Ibid.*
[39]*Ibid.*
[40]LCIA Rules 2014, Art. 8.1.

provision to the rules is to circumvent any jurisdictional objection as well as objections to the enforcement of the award on the basis that was discussed earlier in this paper, namely that the tribunal was not constituted in accordance with party agreement.[41]

E. The Kosovo Rules

Art. 9 of the Kosovo Rules deals with the appointment process of arbitrators in multiparty scenarios and stipulates the following:

> *"1. For the purposes of Article 8, paragraph 1, where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator.*
>
> *2. In the event of any failure to constitute the arbitral tribunal under these Rules, the appointing authority shall, at the request of any party, constitute the arbitral tribunal and, in doing so, may revoke any appointment already made and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator."*

The Kosovo Rules have been adopted in 2011 and, in principle, it must be stated that they follow in the footsteps of the UNCITRAL Arbitration Rules 2010.[42] The provision on the appointment mechanism in *Dutco*-like scenarios in fact is a complete reproduction of Art. 10 (1) and Art. 10 (3) of those rules.

As provided for in Art. 9 of the Kosovo Rules, and as a basic rule similar to other institutional rules before, a division is to be made between the group of claimants, as one side, and the group of respondents, as the other side, both sides being encouraged to agree on a jointly nominated arbitrator.[43] In the event of a failure to constitute the tribunal in accordance

---

[41] *supra* note 37, at 98.

[42] The UNCITRAL Arbitration Rules provide a set of ready-for-use arbitration rules to which parties can refer both in ad-hoc arbitrations as well as in institutional arbitrations. They were adopted by the United Nations Commission on International Trade Law ('UNCITRAL'), available at: https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf, accessed on: 18 October 2016.

[43] CROFT, KEE & WAINCYMER, *A Guide to the UNCITRAL Arbitration Rules*, 2013, at 121.

with Art. 9 (1) because of, potentially, a lack of a commonality of interests, then the second paragraph of Art. 9 is applicable.[44]

Under Art. 9 (2), the appointing authority is given quite broad powers to constitute the tribunal, appoint and re-appoint arbitrators as well as to revoke any appointments already made. Under consideration of the *Dutco* case, this is another institutional response rendered in favor of flexibility.[45] The appointing authority can therefore examine the specific circumstances of each case and, on that basis, either appoint the entire tribunal or only appoint the arbitrator for the defaulting side.

While in principle this rule does seem to observe the findings of the *Dutco* case, a different question arises. This question relates to the issue whether an appointing authority is indeed entitled to revoke an appointment validly made by a party.[46] Via the arbitration agreement and the reference to the rules of a given arbitral institution usually contained therein, the general view is that a contractual (or at least a quasi-contractual) relationship does exist between the arbitrators, the parties and the arbitral institution. The nature of this relationship has been the subject of debate among academics and contributors, who for the moment seem to have come to the agreement that such a relationship resembles a contract for service, but in effect constitutes a *sui generis* contract.[47]

With this background in mind, the question posed above becomes even more pertinent when considering that under the Kosovo Rules, it is the arbitral institution which, by way of Art. 6, is entrusted with the duty to confirm arbitrators and not the appointing authority as a *third party*. Gaillard notes the following on this: *"There is also a contract between the arbitral institution and each of the parties. The institution*

[44] *Ibid.*

[45] *Ibid.*, at 124.

[46] As observed in *supra* note 43, at 125.

[47] For further details on this, *see* BLACKABY, PARTASIDES et al, *Redfern and Hunter on International Arbitration*, 2015, at 5.50 – 5.54. Inter alia, the authors in this contribution distinguish between the *'contractual school'* and the 'status school' when attempting to elaborate on the legal relationship between the parties and the arbitrators. On the legal relationship between the arbitral institution and the arbitrators, *see* GAILLARD & SAVAGE, *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, 1999.

appoints or confirms the appointment of the arbitrators after verifying their suitability; it agrees to treat them as arbitrators in the exercise of its own organizational, administrative and supervisory role […]. As for the arbitrators, by accepting their brief they agree to perform it under the auspices and in accordance with the rules of the institution […]. This is a contract where each party independently promises and performs services for the benefit of the other, and particularly for the benefit of third parties (the parties to the arbitration)".[48]

This represents a deviation from the set-up and practice presented by the other institutional rules analyzed herein and constitutes an approach, which poses legal questions. In all other institutional rules, it is the institution itself, which is responsible for the confirmation *and* the revocation of a valid arbitrator's mandate. An appointing authority stepping in at this point would interfere with the contractual relationship between the arbitrators, the parties and the arbitral institution on the other hand, to which it is not privy.

38

Therefore, while the Kosovo Rules in general represent a modern approach, guided by careful consideration of the core principles of international commercial arbitration and their interpretation by the most arbitration-relevant courts, a rule revision in respect of Art. 9 (2) would nonetheless constitute a balanced and sustained modification.

The competence for the revocation of a valid arbitrator's mandate, in case of a *Dutco*-like scenario, ought to be extended to the arbitral institution for the reasons mentioned before. Thereby, any legal doubts and discussions with regards to the involvement of the appointing authority in this context, even though they may not be insurmountable, would be bypassed. From a practical standpoint, it is also reasonable to assume that an arbitral institution will have a better understanding of the characteristics and features of a particular case as well as more knowledge of the arbitrators' pool in its own market than a third, appointing authority will most likely have. That makes it more competent from a professional perspective when judging whether the

[48] *Ibid.*, at 604.

appointment of the entire tribunal or an appointment only for the defaulting side is the right decision.

IV. Conclusions

To begin with, it must be said that all institutional rules analyzed recognize and are alert to the fact that there may very well be instances, in which the issue of inequality between the parties in respect of the appointment process of arbitrators in multiparty scenarios arises. Also, they evidently treat this issue with great care, having all adopted provisions, in which they try to incorporate *Dutco's* principle of party equality.

As far as the finer nuances are concerned however, it is noticeable that the approach employed by the ICC Rules, the VIAC Rules, the Swiss Rules as well as the Kosovo Rules belong, have extended *discretion* to the institution, or to a third party as appointing authority as in the Kosovo rules to appoint the entire tribunal. They have done so while maintaining the flexibility to depart from such an approach when an assessment of the circumstances of the case warrants this. The LCIA Rules on the other hand and, for instance, also the Arbitration Rules of the Stockholm Chamber of Commerce (*'SCC Rules'*)[49] are more cautious of the *Dutco* doctrine. They have made it *mandatory* for the institution to appoint the entire tribunal. And within the first group mentioned above, another distinction is to be made between the institutions that foresee a substitute appointment only for the defaulting side as a basic, standard solution, such as VIAC; and the institutions that foresee the appointment of the entire tribunal as the standard approach, such as the ICC and the Swiss Rules. The Kosovo Rules on the other hand have found a middle-ground to navigate through the difficulties inherent to these multiparty scenarios.

[49]Art. 13 (4) of the 2010 SCC Rules reads as follows: "*Where there are multiple Claimants or Respondents and the Arbitral Tribunal is to consist of more than one arbitrator, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall appoint an equal number of arbitrators. If either side fails to make such joint appointment, the Board shall appoint the entire Arbitral Tribunal*". (Emphasis added) These rules have not been subject to a detailed analysis within the frames of this paper.

While there is no complete uniformity in respect of the rules governing the constitution of tribunals in multiparty situations, there is one important consideration, on which virtually all institutions agree - the commonality of interests or lack thereof. This allows arbitral institutions to view multiple parties on either side as one entity for the purpose of the conduct of the arbitration proceeding whenever they have aligned interests. Although this has not been incorporated in the literal drafting of the rules itself, it has been accepted by arbitral practice as an appropriate test when dealing with the inequality of parties in a multiparty appointment setting.

In its fundamentals, the *Dutco* case is a balancing act between party equality and party autonomy. Just like in other fields of law, when assessing conflicting considerations, the finer details of the respective case must be worked out, formulated and framed. This is precisely what the institutions attempt to do here, when considering the individual circumstances. Any given party cannot and should not be allowed to rely on the *Dutco* doctrine if, in essence, agreeing on a *shared* arbitrator is not detrimental to its interests because they are substantially aligned with the other party on the same side. Any other approach could in fact lead to procedural abuses.

Ultimately, arbitral institutions are well-equipped to handle *Dutco*-esque disputes by means of the rules that were just portrayed. These rules ensure that the theoretical and legal concerns are addressed, while at the same time providing for ample flexibility to design a case-specific solution. It remains to be seen how these constructs develop further in the future; as of right now however, they provide firm ground on the basis of which the arbitration community can operate.

UDC 341.63

Extent of Court Intervention on Arbitration under Kosovo Arbitration Law and UNCITRAL Model Law

Mentor Bislimi*

Abstract

In this work the author emphasizes the importance of extent of court intervention on arbitration as one of the main issues of arbitration. Relation of court and arbitration is an age-old question that still continues to be present. It is a well-established fact that the extent of court intervention on arbitration is unfold in three phases, namely: before commencement of arbitration proceedings, during the arbitration proceedings and post-award stage. Thus, this article will not address stages of court intervention but will examine and analyze extent of court intervention in general according to Kosovo arbitration law and UNCITRAL Model Law.

The purpose of this study is to elaborate, examine, analyze, compare and interpret provisions determining the extent of court intervention in matters of arbitration and identify existing gaps in the Kosovo Arbitration Law. Furthermore, the paper will assess, analyze and interpret domestic and foreign case law regarding the extent of court intervention.

In the final part the author will suggest recommendations based on a comparative perspective and solutions that are in compatibility with international standards and embraced by Model Law countries.

I. Introduction

This paper intends to discuss the importance of extent of the court intervention as one of the main issues on arbitration. Relation of court and arbitration is an age-old question that continues to be present. This relation is crucial for an effective end of arbitration. “Arbitration and

courts are complementary legal processes; they are not antagonistic or competitive, but rather are partners in a system of international commercial justice".[1] "The understanding and cooperation of judges of national courts is, therefore, a vital and indispensable element in establishing and maintaining international commercial arbitration".[2] "As stated on the first page of the great new work in this field, that of Mustill and Boyd on Commercial Arbitration: The law of private arbitration is concerned with the relationship between the courts and the arbitral process".[3]

Intervention, supervision or court assistance on arbitration is sine qua non. "The Commission[4] made clear that the term "intervene" in Article 5[5] included court action that might be categorized as "assistance" to the arbitration rather than intervention in it"[6]. However, the issue raised for discussion is the stage of the court intervention. It is recognized that courts intervene on arbitration in three stages as follows: before commencement of the arbitration proceedings, during the arbitration proceedings and in the post-award stage. "Court intervention is normally possible only in two situations: where expressly provided for in the arbitration law, or where the issue is not covered by the law".[7] "The real issue is to define the point where this reliance of arbitration on the national courts begins and where it ends".[8]

---

* *Mentor Bislimi is a graduated lawyer from Prishtina, and currently a PhD candidate in International Business Law at the European Centre for Peace and Development. He is currently the Head of Division for Policy Coordination at the Ministry of Health, the Government of Kosovo, while in the past he served as a Senior Officer for approximation and harmonization of national legislation with EU Acquis.*

[1] Resolutions of the working group on arbitration and the courts, VI International Arbitration Congress, Merxico City, March 13-16, 1978, pg.313

[2] Ibid, pg.313

[3] Kerr, M. (1985) Arbitration and the Courts: The UNCITRAL Model Law. The International and comparative law quarterly, Vol.34, no.1.London: Cambridge University Press. Available from: https://www.jstor.org/stable/759434?seq=1#page_scan_tab_contents, pg.1

[4] The United Nations Commission on International Trade Law (UNCITRAL) established by the General Assembly in 1966

[5] "UNCITRAL Model Law on International Commercial Arbitration" adopted by the General Assembly of the United Nations on 11 December 1985 as amended in 2006 (note added by the author of the paper)

[6] Holtzmann, H.M. & Neuhaus, J.E. (1989) A Guide to the UNCITRAL Model Law on International Commercial Arbitration, Legislative History and Commentary, pg.216

[7] Lew, D.M.J. & Mistelis, L.A. & Kröll, M.S. (2003) Comparative International Commercial Arbitration. The Hague: Kluwer Law International, BV., pg.359

[8] Blackbay, N. & Partasides, C with Redfern, A. & Hunter, M. (2009) Redfern and Hunter on International Arbitration. New York: Oxford University Press.pg.440

"With the acceptance of party autonomy the level of court intervention has significantly diminished over the years".[9] In this regard, based on this principle, the majority of the legal provisions of the Kosovo Arbitration Law[10] (hereinafter KAL) and the UNCITRAL Model Law on International Commercial Arbitration of 1985 as amended in 2006 (hereinafter Model Law) are not mandatory.

The paper will discuss Article 3 of the KAL, which bans court intervention in an arbitration proceeding comparing it with Article 5 of the Model Law, which bans court intervention in all matters governed by law. This paper will not address stages of court intervention. Furthermore, this paper will assess, analyze and interpret case law regarding the extent of court intervention. In the conclusion the author will propose recommendations based on comparative perspective and solutions that are in compatibility with international standards and embraced from model law countries.

II. The principle *Lex Specialis* in arbitration

KAL as a specific law has entered into force in 2008. "This law is considered to be a modern law and its provisions have *lex specialis* character in relation to LCP[11] with regard to arbitration procedure".[12] Model Law character as *lex specialis* is set forth in Fourth Secretariat[13] Note when it is emphasized "*that the model law is designed to establish a special legal regime for international commercial arbitration which, in the States adopting it, would prevail over any other municipal law on arbitration*".[14] Furthermore, in the first page of the Fourth Secretariat Note, Articles 1, 5, 34, 36[15] highlighted *lex specialis* character of the Model Law.

---

[9] Lew, D.M.J. & Mistelis, L.A. & Kröll, M.S. (2003) Comparative International Commercial Arbitration. The Hague: Kluwer Law International, BV., pg.355

[10] The Law No.02/L-75 on Arbitration in Kosovo is approved in January 26, 2007 and entered into force in June 5, 2008 available at: https://gzk.rks-gov.net/

[11] Kosovo Law No.03/L-006 On Contested Procedure as amended by Law No.04/L-118 in 2012 available at https://gzk.rks-gov.net/

[12] Morina, I. (2015) Arbitrazhi dhe Procedura e Arbitrazhit, fq.40

[13] Secretariat of the United Nations Commission on International Trade Law (UNCITRAL)

[14] Fourth Secretariat Note comments and suggestions on the fourth draft, A/CN.9/WG.II/wp.50 (16 December 1983) pg.231

[15] **Article 1. Scope of application**(1) This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States. (2) The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State……..;**Article 5.Extent of court intervention** In matters governed by this Law, no court shall intervene except where so provided in this Law; **Article 34. Application for setting**

Considering the above, "once the Model Law is enacted in State X, "this Law applies" *as lex specialis*, i.e. to the exclusion of all other pertinent provisions of non-treaty law, whether contained, for example, in a code of civil procedure or in a separate law on arbitration".[16] Special law prevails over general law based on the principle *"lex specialis derogate lex generalis"*. "The maxim *lex specialis derogate legi generali* is widely accepted as constituting a general principle of law".[17] "It entails that, when two norms apply to the same subject matter, the rule which is more specific should prevail and be given priority over that which is more general".[18]

"It should be noted (and possibly should be expressed in article 1) that the Model Law prevails over other provisions only in respect of those subject-matters and questions covered by the Model Law".[19] "Therefore, other provisions of national law remain applicable if they deal with issues which, though relevant to international commercial arbitration, have been left outside the Model Law (e.g. capacity of parties to conclude arbitration agreement, impact of State immunity, consolidation of arbitral proceedings, competence of arbitral tribunal to adapt contracts, contractual relations between arbitrators and parties or arbitration bodies, fixing of fees and request for deposits, security for fees or costs, period of time for enforcement of arbitral award)".[20]

III. Court competence under Kosovo Arbitration Law

aside as exclusive recourse against arbitral award (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article. (2) An arbitral award may be set aside by the court specified in article 6 only if: *a)* the party making the application furnishes proof that: i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or…….;**Article 36. Grounds for refusing recognition or enforcement**(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: *(a)* at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or……

[16] Analytical commentary on draft text of model law on international commercial arbitration: report of the Secretary General (A/CN.9/264, para 7, pg.107)

[17] Pineschi, L. (2015) General principles of law – The rule of the Judiciary, Springer International Publishing Switzerland, pg.265

[18] Ibid, pg.265

[19] Analytical commentary on draft text of model law on international commercial arbitration: report of the Secretary General (A/CN.9/264, para 8, pg.107)

[20] Ibid, para 8, pg.107

Extent of court intervention is one the main issues in arbitration. When an arbitration matter is submitted for review to the court, "plainly, the court must ask itself the question whether it has jurisdiction to intervene".[21] "The cooperation and support of national courts may be needed at all stages of the arbitration process – in recognizing agreements to arbitrate, in assisting during arbitration proceedings, and in enforcing arbitral awards".[22]

According to KAL courts can either expressly or impliedly intervene or assist the parties or arbitral tribunal in three phases as follows: **First, before the commencement of arbitration proceedings:** interim measures, composition of arbitral tribunal and enforcement of arbitration agreement or referral of court action to arbitration. **Second, during the arbitration procedure:** challenge of arbitrator, termination of mandate of arbitrator, replacement of arbitrator, enforcement of arbitration agreement, decision on jurisdiction of the arbitral tribunal, collection of evidence, interim measures, enforcement of interim measures issued by arbitral tribunal and decision on costs. **Third, post award stage:** setting aside of arbitral award, enforcement of arbitral awards made inside Kosovo and recognition and enforcement of arbitral awards made outside Kosovo.

To determine the extent of court intervention, courts should first decide whether the referred issue is governed by the KAL. The procedure to be followed depends on the answer to this question, which may be positive or negative. This is due to the fact that it is not easy to reach a conclusion if a certain issue is governed or not by KAL. If the answer to the question raised above is positive, then the court is obliged to apply KAL as *lex specialis*. Exempli causa, Article 37 of KAL forbids the party complaint against the request for recognition and enforcement of both domestic and foreign awards. Consequently, if the complaint is prohibited, then revision is prohibited too. Case law of the Court of Appeal[23] and Supreme Court of Kosovo[24] proves otherwise. In this particular case elaborated below, both courts apply its procedural rules, although the appeal and revision of the recognition and

[21] Analytical compilation of comments by Governments and international organizations on the draft text of a model law, Vienna, 1985, A/CN.9/263/Add.2, par 21, pg.6

[22] Resolutions of the working group on arbitration and the courts, VI International Arbitration Congress, Mexico City, March 13-16, 1978, pg.314

[23] Decision of the Appeal Court no. Ae.nr.129/2014

[24] Decision of the Supreme Court of Kosovo, E.Rev.nr.28/2015, date July 22, 2015

enforcement of the award is prohibited according to the KAL.

The situation is clear as the law explicitly defined powers of the court to intervene on arbitration. On the other hand, if the answer is negative i.e. that particular issue is not governed by the KAL, the court will be free to apply another domestic law which governs that particular issue, e.g. application of the Law of Civil Procedure to assist arbitral tribunal for the purpose of collecting evidence, application of the Law on Non-Contentious procedure in the recognition and enforcement procedure of the arbitral award made outside Kosovo. The same approach[25] in application of other national laws in cases where an issue is not regulated by the law of arbitration has prevailed in the draft working documents during the process of drafting Model Law thereof.[26]

Regarding the second answer i.e., the application of the legal provisions of other laws, the authors Triva and Uzelac stated that "For issues not governed by the arbitration law there should not seek a solution by relying on the rules of analogous application of a provision of the law on civil procedure (even when it comes to arbitration without a foreign element), but the solution must be requested based in the principles and rules that correspond to the specific nature of arbitration, and came to express or resume expression in the law of arbitration".[27]

So, application of the general law or legal provisions of other laws by the court should come into play only for the reasons stated above or if no solution can be found within the provisions and principles laid down in KAL.

IV. Extent of Court intervention under Kosovo Arbitration Law and UNCITRAL Model Law

Central to the matter of the court intervention is the principle of party autonomy. In this regard, the majority of both KAL and Model Law provisions are not mandatory, which "allow parties the freedom to decide how they want their disputes resolved – with minimal court intervention,

[25] Analytical compilation of comments by Governments and international organizations on the draft text of a model law, Vienna, 1985, A/CN.9/263/Add.2, par 20, pg.6

[26] Composite draft text of a model law on international commercial arbitration: Note by the secretariat A/CN.9.WG.II/WP.50, paragraf 4, pg.231

[27] Triva, S. &Uzelac, A. (2007) Hrvatsko Arbitrazno Pravo, Komentar Zakona o arbitrazi I drugi izvori hrvatskog arbitraznog prava, pg.4

but with maximum court support".[28] In principle, courts intervene or assist on arbitration only within the limits determined by legal provisions of the arbitration laws. The arbitration acts lay down the powers of the courts in relation to arbitrations but they provide virtually no information about the circumstances in which these powers are in fact exercised by the courts.[29]

Article 3 of KAL laid down extent of court intervention, while Model Law sets forth this issue in Article 5. "This article relates to the crucial and complex issue of the role of courts in regard to arbitration".[30] Article 3 of the KAL has certain differences compared to Article 5 of the Model Law. A direct comparison of Article 5 of the Model Law and Article 3 of the KAL is presented below. Sentences highlighted in bold are the differences between Model Law and the KAL, while the same sentences are equally understandable.

In matters governed by this law, no court shall intervene except where so provided in this law (Model Law Article 5)

No court in Kosovo may intervene in **arbitration proceedings**, unless otherwise provided for in this Law (KAL Article 3)

"Article 5 is a key provision of the Model Law".[31] "Its purpose is to oblige the draftsmen of the Law to state any instances in which court control is envisaged, in order to increase certainty for parties and arbitrators and further the cause of uniformity".[32] "The effect of the provision is to "exclude any general or residual powers" given to a court of the enacting State in statutes other than the Model Law".[33] "The scope of article 5 is, thus, narrower than the substantive scope of application of the Model Law, i.e. "international commercial arbitration" (article 1), in that it is limited to those issues which are in fact

[28] Croft, C. (2013) How judiciary can support domestic and international arbitration. Auckland: The Arbitrators' and Mediators' Institute of New Zealand Conference, pg.124

[29] Kerr, M.(1985) Arbitration and the Courts: The UNCITRAL Model Law. The International and comparative law quarterly, Vol.34, no.1.London: Cambridge University Press. Available from: https://www.jstor.org/stable/759434?seq=1#page_scan_tab_contents, pg.8

[30] Analytical commentary on draft text of model law on international commercial arbitration: report of the Secretary General (A/CN.9/294, pg.112)

[31] UNCITRAL., "2012 Digest of Case Law on the Model Law on International Commercial Arbitration", pg.20

[32] Holtzmann, H.M. & Neuhaus, J.E. (1989) A Guide to the UNCITRAL Model Law on International Commercial Arbitration, Legislative History and Commentary, pg.216

[33] Ibid, pg.216

regulated, whether expressly or impliedly, in the Model Law".[34]

"It emphasizes that the role of the courts to intervene in arbitrations conducted under the Model Law is limited strictly to such matters as are specifically provided in this Law".[35] Meaning of Article 5 of the Model Law is explained also during the drafting process such as: "Article 5 by itself does not take a stand on what is the appropriate role of the courts but guarantees that all instances of possible court intervention are defined in this Law, except for matters not regulated by it (for instance, consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institutions, or fixing of costs and fees, including deposits)".[36] "It is submitted that similar considerations apply with regard to draft article 5 although to a more limited extent, since the distinction between matters governed by the Law and those not governed thereby is relevant there only in respect of possible court supervision or assistance".[37]

On the other hand, the author Musa, explained court jurisdictions according to KAL. He emphasized that "KAL limits court competences after commencement of arbitral proceedings and prevents the parties from submitting claims before a court after the arbitral proceedings".[38] According to the comparison given above, it could be argued that Article 3 of the KAL is defined in a vague manner. The question raised for discussion is: Does Article 3 of the KAL have the same meaning compared to Article 5 of the Model Law?

Article 3 of the KAL is headed under "Jurisdiction of Courts" and structured within Chapter 1 General Provisions. General provisions include rules that are applicable to all stages of the proceedings and not for e.g. the validity of arbitration agreements, the number of arbitrators, the beginning of the arbitration proceedings, which belong to a certain stage of the arbitral procedure. Chapter 1 of the KAL includes four (4) articles, and the issue of the court's intervention listed under the general provisions, in the same manner as in the Model Law. Title

[34] Analytical commentary on draft text of model law on international commercial arbitration: report of the Secretary General (A/CN.9/264, para.4, pg.112)
[35] UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, United nations, New York, pg.20
[36]UNCITRAL., "2012 Digest of Case Law on the Model Law on International Commercial Arbitration", pg.20
[37]Holtzmann, H.M. & Neuhaus, J.E. (1989) A Guide to the UNCITRAL Model Law on International Commercial Arbitration, Legislative History and Commentary, pg.222
[38] Musa, M. (2012) E Drejta e Arbitrazhit. Gjilan: Pika 5A.fq.57

of Article 3 of the KAL does not correspond with its contents. In addition, it is important to mention that in a footnote of Article 1 of the Model Law noted "Article headings are for reference purposes only and are not to be used for purposes of interpretation".[39] Article 3 of the KAL sets the boundaries of the court intervention with regard to arbitration, but its content does not correspond to the function and role as a general provision. The content of Article 3 of the KAL is narrower compared to Article 5 of the Model Law.

The comparison presented above shows that the phrase **"in matters governed"** as in Model Law is not included in KAL; instead it includes the term **"arbitration proceedings"**. "The first feature, which alleviated some of the fears, is the limitation expressed by the words 'in matters governed by this Law".[40] "This phrase determines whether a court's power to intervene is governed by the Model Law, or by other provisions of domestic law, including, possibly, general or residual powers to supervise arbitral procedure".[41] During the drafting process of Model Law, "the Secretariat noted that a matter could be governed or regulated by the Model Law either "expressly or impliedly".[42] "As an example of a matter that was impliedly governed by the Law, the Secretariat suggested that the parties' freedom under Article 11(2) to agree on a procedure for appointing arbitrators impliedly excluded any court power to confirm the appointment, such as is provided in some domestic laws".[43] Article 3 of the KAL provides that no court can intervene in the arbitral proceedings i.e. that this part of the paragraph refers to the intervention of the court in a phase of the arbitral process. How should we understand the term "arbitration proceedings"; all matters governed by this law or just a phase of arbitration process?

The KAL provides no definition of the arbitration proceedings. However, commencement of arbitral proceedings is provided by Article 18.[44] In addition,

[39] Analytical commentary on draft text of model law on international commercial arbitration: report of the Secretary General (A/CN.9/264, para 7, pg.107)

[40] Herrman, G. (1987) The role of the courts under the UNCITRAL Model Law script in Lew, D.M.J. (1987) Contemporary Problems in International Arbitration. London: Martinus Nijhoff Publishers, pg.168

[41] Holtzmann, H.M. & Neuhaus, J.E. (1989) A Guide to the UNCITRAL Model Law on International Commercial Arbitration, Legislative History and Commentary, pg.216

[42] Ibid, pg.217

[43] Ibid, pg.217

[44] **Article 18 Commencement of Arbitral Proceedings** Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on

Article 1 "Scope of Application" refers to three phases of arbitration process, unlike Article 3 which restricts court intervention only at a stage of arbitration process. Article 1 of the KAL reads the following:

> The present law set forth the rules that apply to **arbitration agreements, arbitration proceedings** and the **recognition and enforcement** of arbitral awards made inside and outside Kosovo.

Court intervention based on Article 3 of the KAL is limited only to arbitration proceedings, unlike Model Law, whereby the extent of court intervention limited to all matters governed by law. Nevertheless, according to KAL, court intervenes on arbitration in three phases: before the commencement of arbitration proceedings, during arbitration proceedings and post award stage (see supra III).

Therefore, Article 3 of the KAL limits court intervention, only in arbitral proceedings. As a result, formulation and content of Article 3 is not in compliance with Article 1 of the KAL.

Case Law on Article 3 and 39 under the Kosovo Arbitration Law

In the following discussion, it will be argued that both the Supreme Court[45] and Appeal Court[46] of Kosovo acted against the principle of KAL character as *lex specialis* and applied general procedural law. The case relates to the recognition and enforcement of the foreign arbitration award issued by International Chamber of Commerce.[47] The case law for analysis here deals with the appeal submitted to the Appeal Court and revision request submitted to the Supreme Court of Kosovo in the matter of a foreign company, Amdocs Development Limited seated in Cyprus (the plaintiff), against the domestic company, Post and Telecom of Kosovo (the defendant).

The plaintiff in this case filed a request before the Basic Court in Prishtina – Department for Commercial Matters for recognition and enforcement of the arbitral award made outside Kosovo. The Basic Court in Prishtina approved the plaintiff's request. The defendant filed an

---

the date on which a request for the dispute to be referred to arbitration is received by the respondent.

[45] Decision of the Supreme Court of Kosovo, E.Rev.nr.28/2015, date July 22, 2015

[46] Decision of the Appeal Court No. Ae.nr.129/2014

[47] Case No. OEN 17878/ARP/MD/TO; May 7, 2013

appeal against the decision of the Basic Court. The Court of Appeal rejected the appeal filed by the defendant and affirmed the decision of the first instance court. The highest judicial authority in Kosovo dismissed the revision request.

The procedure of the recognition and enforcement of a foreign arbitral award is determined by KAL. Articles 37 and 39 of the KAL allows only one type of recourse and this is a request for recognition and enforcement of arbitral award made outside Kosovo. Hence, the KAL does not allow filing of an appeal or revision request, as a remedy against the request for recognition and enforcement of foreign arbitral award. On the other hand, the Law on Contested Procedure provides for revision[48] as an extraordinary remedy to set aside final decision rendered by the appeal court. "The Model Law attempts to ameliorate this situation, which is of considerable concerns to those involved in international commercial arbitration".[49] "The first measure of improvement is to allow only one type of recourse, to the exclusion of any other means of recourse regulated in another procedural law of the State in question".[50]

51

In this case, the Supreme Court of Kosovo reasoned that a:

> *"Revision as an extraordinary mean to set aside decisions should be decided according to the Law on non-contentious procedure".*

Furthermore, the Supreme Court held:

> *"The Supreme Court considers that the revision submitted against the final decision of the Court of Appeal concerning the recognition of an arbitral award made outside of Kosovo is not allowed even for the fact that the same Revision has nothing to do with the procedure in which is decided for dwelling matters and related with compensation for expropriated real estate, for which according to Article 27.1 and 2 of the Law on non-contentious procedure Revision is allowed".*

In other words, based on the reasoning of the Supreme Court, revision request would be allowed in the case in which it is decided for dwelling matters and related with compensation for expropriation of the real estates.

---

[48] Articles 211-231

[49] Explanatory note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration, UN Document A/40/17, Annex I, par.40, pg.23

[50] Ibid, par.41, pg.23

According to the author Karl-Heinz Böckstiegel, in "The ICC arbitration in the Kaliningrad Case that became public through the challenge procedure before the French courts which resulted in the court confirming our award and dismissing the challenge", it was concluded that "it was the clear intention and result of the New York Convention that no further appeals should be available against court decisions recognizing and enforcing a foreign arbitral award other than those expressly mentioned in the Convention itself".[51] According to authors (Volders & Retornaz), "Both instruments affirm that a revision of the merits of the arbitral award, either when challenging the award (UNCITRAL Model Law) or during enforcement proceedings (1958 New York Convention), cannot be tolerated".[52]

Considering the above, is the reasoning of the Supreme Court properly justified? To answer this question, we should again clarify the meaning of Article 3 of the KAL, in which case we would have two possible conclusions:

- Article 3 limits the court intervention only at a stage of arbitration, respectively in arbitration proceedings;
- Article 3 limits the court intervention in all matters governed by the KAL.

If we consider the first option, then it may be assumed that the Supreme Court in the reasoning has properly applied Article 3 of the KAL, because Article 3 limits court intervention in arbitration proceedings or in a stage of arbitration. According to this interpretation, the court is free to intervene before the commencement of arbitration proceedings and in the post award stage. However, even in this case the court should take into consideration *lex specialis* character of the KAL and apply Article 37 and 39 of the KAL under which appeal and revision is not allowed.

Furthermore, article 37 bans appeals against all court decisions which are not expressly foreseen in the KAL. As

[51] Böckstiegel, K.H, (2012) Commercial and Investment Arbitration: How Different are they Today, Arbitration International-The Journal of the London Court of International Arbitration. London: LCIA, pg.584

[52] Volders, B &Retornaz, V, (2006) Switzerland challenging an arbitral award for infringement of competition law: The Terra armata decision of the Swiss Federal Tribunal of 8 march 2006. Yearbook of Private International Law, (2006) Volume VIII (2005). Lausanne: Sellier European law publishers & Swiss Institute of Comparative Law, pg.309

a result, Articles 3, 37 and 39 should be interpreted in conjunction and not separately.

In conclusion, as mentioned above, "Court intervention is normally possible only in two situations: where expressly provided for in the arbitration law or where the issue is not covered by the law".[53] Although there may be dilemma about the meaning of Article 3, none of the abovementioned conditions is fulfilled. Therefore, the court has no competence to intervene in the procedure of the recognition and enforcement of a foreign arbitral award made outside Kosovo. In other words, the court has the power to recognize and enforce, or reject as well, the request for recognition and enforcement of a foreign arbitral award, but not to use other types of remedies such as appeal and revision.

Regarding second option, if article 3 limits the court intervention in all matters governed by the KAL, then the situation is clear enough. If the court were to rely on article 3 (second option) of the KAL, then we could conclude that the Supreme Court did not properly assess the reasoning of the decision. This is due to the fact that, the KAL does not provide for revision as a remedy for recognition and enforcement of arbitral award. Moreover, if Article 3 limits the court intervention for all matters governed by the KAL, we could conclude that the revision is inadmissible and in any case the court must have dismissed it as inadmissible.

Hypothetically, if the dispute in this case would be related to Article 27 of the Law on Non-contentious Procedure,[54] then on the basis of the reasoning, it can be concluded that the Supreme Court would accept revision as a means for reviewing of the arbitral award. Such an action would be contrary to the *lex specialis* character of the KAL and Article 37 and 39 as well.

Furthermore, the Court of Appeal reviewed and rejected the appeal filed by the defendant, although according to Article 37 and 39 of the KAL appeal is not allowed.

---

[53] Lew, D.M.J. & Mistelis, L.A. &Kröll, M.S. (2003) Comparative International Commercial Arbitration. The Hague: Kluwer Law International, BV., pg.359

[54] **Article 27 Judgment strike with revision** 27.1 In contentious procedure in which it is decided for dwelling matters and related with compensation for expropriated real asset, can be use revision against second step judgment which has taken final form. 27.2 In mentioned juridical matters in paragraph 1 of this article revision is permitted under determined conditions with law for contentious procedure, if it is not foreseen differently by law; Kosovo Law of Civil Procedure No.03/L-007 On Non-Contentious Procedure as amended is approved in November 20, 2008 and entered into force in January 28, 2009 available at https://gzk.rks-gov.net/

Therefore, in the recognition and enforcement of the award procedure, the court should not allow the use of other additional types of remedies that are not specified in the KAL.

To summarize, courts in Kosovo in the future would have to act based on a part of the Supreme Court reasoning. Regarding this the Supreme Court held:

> *"The KAL does not recognize the possibility for submitting an appeal and revision against the court decision for recognition and enforcement award made outside Kosovo".*

V. Model Law States

Germany: In accordance with Article 5 of the Model Law, extent of court intervention is regulated in the same manner by the states which have based their domestic laws on the Model Law. For instance, arbitration in Germany is governed by the Code of Civil Procedure (ZPO) adopted in 1879. The tenth book of the Code of Civil Procedure contains German Arbitration Law. The German Code of Civil Procedure is based on Model Law. Section 1026 of the Code of Civil Procedure is in accordance with Article 5 of Model Law.[55] In comparison with KAL, which defines court intervention only in arbitration proceedings, German Code set forth court intervention in all matters governed by the law, similar to the Model Law.

Croatia: The Law on Arbitration in Croatia is based on Model Law and was adopted in 2001. "Although, with very little difference arising from the difficulty in translation, it should be noted that based on the content, Article 41 paragraph 1 is identical to Article 5 of Model Law".[56]

Poland: "The 1964 Code of Civil Procedure is now the main statute regulating arbitration in Poland".[57] "Since its enactment, the CCP has been changed multiple times, the

[55] **Section 1026 Extent of court intervention** In matters governed by sections 1025 to 1061, no court shall intervene except where so provided in this Book.

[56] Triva, S. & Uzelac, A. (2007) Hrvatsko Arbitrazno Pravo, Komentar Zakona o arbitrazi I drugi izvori hrvatskog arbitraznog prava, pg.349; **Court intervention Article 41 (1)** No court shall intervene in matters governed by this law, except where it is so provided in this Law.

[57] Pietkiewicz, P., Bielarczyk, P., Lewandowski, P., Aslanowicz, M., Olechowski, M., Tujakowska, A., Krużewski, B., Szpara, J., Morek, R., Sadowski, W., Hartung, M. & Świątkowski, M. (2011) *Arbitration in Poland*.Warszawa: Sąd Arbtrażowy przy KrajowejIzbie Gospodarczej, pg.27

major amendment being introduced in 2005".[58] The part V of the Code of Civil Procedure contains Poland Arbitration Law. Article 1159 has included Article 5 of the Model Law. "Therefore, the provisions set out by the Model Law have been generally adopted".[59]

V. Non Model Law States

England: Arbitration in England is governed by the Arbitration Act adopted in 1996. The England Arbitration Act is not based on Model Law. However, the England Arbitration Act included Article 5 of the Model Law in section 1 paragraph 1 point (c); According to Arbitration Act 1996, principles laid down in Part I, Section 1 such as: object of arbitration, party autonomy and court intervention are essential to its construction. "Where, for example the meaning of any section in Part I has to be considered because it leaves room for doubt or is open to more than one interpretation, these principles provide the basic for interpretation".[60]

55 Finland: Arbitration in Finland is regulated by the Arbitration Act adopted in 1992. The Finnish Arbitration Act is not based on Model Law. During drafting process of the Model Law, the Finish delegation regarding article 5 of the Model Law proposed: "it might be better to replace the words "In matters governed by this Law" with the admittedly narrower provision "During the course of the arbitration proceedings".[61] Nevertheless, the words "In matters governed by this Law" were incorporated within the Finnish Arbitration Act instead the words "During the course of the arbitration proceedings". Despite this, the Finnish Arbitration Act included Article 5 of the Model Law. There is no substantive difference between Article 7 of the Finnish Arbitration Act and Article 5 of the Model Law.

Albania: Albanian Code of Civil Procedure no.8116, date 29.3.1996 determines arbitration with a particular chapter. The arbitration process is regulated by Article 400 to Article 441. "This chapter is repealed by the Law no.122 / 2013 by transitional provisions and sections 400-441 remain in force until the adoption of a special

[58] Ibid, pg.27
[59] Ibid, pg.29
[60] Harris, B. & Planterose, R. & Tecks, J. (2007) The Arbitration Act 1996 A Commentary. 4th edition.Oxford: Blackwell publishing, Inc, pg.30
[61] Holtzmann, H.M. & Neuhaus, J.E. (1989) A Guide to the UNCITRAL Model Law on International Commercial Arbitration, Legislative History and Commentary, pg.234

law on arbitration.[62] "Albanian Code of Civil Procedure it does not regulate at all the extent of court intervention in the arbitration process".[63]

Conclusions

KAL entered into force in 2008, and its provisions have *lex specialis* character. The majority of both KAL and Model Law provisions are not mandatory. According to KAL, courts can either expressly or impliedly intervene or assist on arbitration as follows: before the commencement of arbitration proceedings, during arbitration proceedings and post award stage. Intervention, supervision or court assistance on arbitration is sine qua non and its aim is to support the arbitral process. To determine the extent of court intervention, courts should first decide whether the referred issue is governed by the KAL.

If a certain issue is governed by KAL, then the court is obliged to apply KAL as *lex specialis*. On the contrary, if particular issue is not governed by the KAL, the court will be free to apply another domestic law which governs that particular issue, e.g. application of the Law of Civil Procedure to assist arbitral tribunal for the purpose of collecting evidence, application of the Law on Non-Contentious procedure in the recognition and enforcement procedure of the arbitral award made outside Kosovo, etc. Thereby, courts intervene in the arbitration in two ways: first, when it is expressly so determined by law on arbitration and second when the issue is not governed by the law on arbitration.

Article 3 determines extent of court intervention under the KAL while the Model Law sets forth this issue by Article 5. The content of Article 3 of the KAL is narrower compared to Article 5 of the Model Law. Article 3 of the KAL sets the boundaries of the court intervention with regard to arbitration. The phrase "in matters governed" as in Model Law is not included in KAL; instead it includes the term "arbitration proceedings".

Article 3 of the KAL provides that no court can intervene in the arbitral proceedings i.e. that this part of the paragraph refers to the intervention of the court in a

[62] Buna, Gj. (2015) Kodi I Procedurës Civile. Tiranë: Alb Juris, fq.143
[63] Mëneri, S. (2012) E drejta e arbitrazhit dhe e ndërmjetësimit ndërkombëtar tregtar, Tiranë, fq.68

phase of the arbitral process, unlike the Model Law which extent of court intervention determine in all matters governed by law. In addition, Article 1 "Scope of Application" of the KAL refers to three phases of arbitration process, unlike Article 3 which restricts court intervention only at a stage of arbitration process.

Regarding case law, the Supreme Court has not carried out a proper assessment, because the KAL as *lex specialis* govern this issue according to Article 37 and 39 and consequently does not allow filing of an appeal or revision request, as a remedy against the request for recognition and enforcement of foreign arbitral award made outside Kosovo. The Supreme Court dismisses revision due to conditions laid down in Article 27 paragraph 1 and 2 of the Law on Non-Contentious Procedure. In addition, based on the reasoning of the Supreme Court, revision request would be allowed in the case in which it is decided for dwelling matters and related with compensation for expropriation of the real estates.

In fact, courts in Kosovo in the future would have to act based on a part of the Supreme Court reasoning. Regarding this, the Supreme Court held “the KAL does not recognize the possibility for submitting an appeal and revision against the court decision for recognition and enforcement award made outside Kosovo”.

Although there may be a dilemma in the interpretation of Article 3 of the KAL, nevertheless, the court should not allow the use of other types of remedies that are not expressly specified by the KAL. Before the court decides in such cases, it must take account the following:

- *Lex - specialis* character of the KAL;
- When the issue is governed by KAL, the court has no competence to intervene;
- The court has competence to intervene only when the issue is not governed by KAL;
- Solution should be sought based on the principles and rules regarding specific nature of arbitration.

In conclusion, if from the interpretation of Article 3 results that the court intervention is limited only to arbitration proceedings, then the court intervention is not limited in two other stages, and that prior to arbitration proceedings and post award stage. Which will be the consequences of the implementation of Article 3 remains to be seen, however, it is recommended that the law de

lege ferenda regulate this matter in the same manner like Model Law and other model law States.

UDC 34:796

Prospects for Developing Sports Arbitration in Kosovo

Luljeta Plakolli - Kasumi[1] and Vjosa Misini[2]

Abstract

Recent developments and success stories related to Kosovo sports convey the necessity to explore the legal infrastructure related to sports. Only this year, Kosovo made an international breakthrough in sports by getting admission in both UEFA and FIFA, and its sportswomen made history by winning the first-ever gold Olympic medal in Rio2016. Last year, Kosovo was granted admission to FIBA, thus becoming its 215th member. The internationalization of the Kosovo sport demands the establishment of an effective and efficient sports system aligned to rules of international sports associations, EU law and other international standards, as well as sound institutional infrastructure that will implement this regulatory framework.

Along with the development of the sports law, many countries have also developed national sports arbitration bodies thus providing to sports organizations, members of the national Olympic Committees and other interested parties, a forum

[1] *Luljeta PLAKOLLI-KASUMI is a teaching assistant and lecturer at the Law Faculty of the University of Prishtina and heads the legal service line at the Tax & Legal Department of Deloitte Kosova shpk. She holds a bachelor degree in Law from the Law Faculty of the University of Prishtina and LLM Degree in International and Comparative Law with special emphasize in Intellectual Property Law from the University Of Pittsburgh School Of Law. Luljeta serves on two list of arbitrators: the Permanent Tribunal of Arbitration attached to the Kosovo Chamber of Commerce and JSM Permanent Court of Arbitration in Slovakia. She is also a national reporter to the International Arbitration Case Law- a private non-for profit academic endeavor in partnership with the School of International Arbitration (SIA), Center for Commercial Law Studies, and Queen Mary University of London.*

[2] *Vjosa MISINI is a Senior Legal Consultant at the Tax & Legal Department of Deloitte Kosova. She holds a bachelor degree in law from the Law Faculty of the University of Prishtina and LLM Degree from the University of London-Queen Marry. She specializes in international commercial law, banking law and property law.*

where they can refer their contractual disputes related to sport. In Kosovo, arbitration law has received a significant attention during the last couple of years and two arbitration centers have been established, one with the American Chamber of Commerce (AmCham) and another one with the Kosovo Chamber of Commerce (KCC). Both arbitration centers provide commercial arbitration services, and while commercial arbitration and sports arbitration share many characteristics, the sports arbitration, nevertheless distinguishes from non-sports-related arbitration in many aspects. Sports-related disputes are facilitated with procedural rules specifically adapted to sports thus ensuring speed, special expertise, and last but not the least, consistency and transparency. In addition, sports-related arbitration bodies also serve as a final court of appeal for disciplinary cases.

The aim of the present paper is to examine Kosovo's current legal and institutional infrastructure related to sports and present some findings with regard to the level of its conformity with EU and international standards, as well as to look into the possibilities of creation of a national sports arbitration body for settlement of sports-related disputes, mainly based on the Court of Arbitration for Sport mode.

I. Introduction

Sports law represents one of the branches of economic development.[3] If developed and implemented properly it can bring countless benefits to national economy, improve welfare of athletes and bring into international spotlight Kosovo's image and capability in the area of sports[4]. Regardless of recent success stories with regard to internationalization of Kosovo sports, little has been done in

[3] According to the European Commission Sport has a significant and growing impact on Europe's economy and society. As it is a labor-intensive industry, forecast growth is likely to lead to additional employment – contributing to the goals of the Europe 2020 Strategy, available at: http://ec.europa.eu/competition/sectors/sports/overview_en.html (''Sport has a huge economic impact in the EU: €407 billion in 2004, representing 3.7% of EU GDP and employing15 million persons (5.4% of the labor force'').

[4] As is recognized by the Amsterdam Declaration, sport in Europe has important social relevance. The Declaration states explicitly that sport has a role in forging identity and bringing people together. Sport represents and strengthens national or regional identity by giving people a sense of belonging to a group. It unites players and spectators giving the latter the possibility of identifying with their nation. Sport contributes to social stability and is an emblem for culture and identity. See ''The European Model of Sport'' a Consultation Document of DG X of the European Commission found at: http://www.bso.or.at/fileadmin/Inhalte/Dokumente/Internationales/EU_European_Model_Sport.pdf

terms of reforming and aligning Kosovo sports legislation with European sports system and international standards and best practices. With power comes responsibility and with its admission this year to FIFA[5], UEFA[6], and the winning of the first ever-gold medal in the Olympics[7], Kosovo has earned itself an enormous and important task ahead. The internationalization of the Kosovo sports demands the establishment of an effective and efficient sports system aligned to rules of international sports associations, EU law and other international standards, as well as sound institutional infrastructure that will implement this regulatory framework.

Along with this, there emanates a need to establish a national sports arbitration center that would provide to different sports organizations, its members, members of the National Olympic Committee and other interested parties a forum to settle their disputes related to sports. While arbitration law *per se* has received a significant interest and has marked a solid development during the past couple of years, debate on issues such as sports law and sports related disputes has been lacking. The drafting of a new sports law is not a simple assignment and it requires involvement of a number of experts, institutions, academics as well as substantial debate in order to come up with the best sports development strategy. The example of Croatian Sports Act enacted in 2006[8] serves as a very good example in this regard.

The aim of the present paper is twofold: first, to make an analysis of current legislative and institutional framework pertaining to sports in Kosovo and identify gaps and needs for further development, and secondly to open a debate for creation and development of a national sports arbitration center.

In order to be able to compare the existing sports legislation of Kosovo with the requirements deriving from the EU Sport Law, obligations of other international organizations as well as rules of international sport federations, there should be first an analysis of what constitutes European sports law, what are the main international instruments in the field of

[5] See the official webpage of FIFA at: http://www.fifa.com/associations/uefa/index.html
[6] See the official webpage of UEFA at: http://www.uefa.com/memberassociations/association=kos/index.html
[7] See the news in the official webpage of the National Olympic Committee (NOC) of the Republic of Kosovo at: http://www.noc-kosovo.org/?page=1,8,289
[8] To access the Croatian Sports Act refer to the website of the Ministry of Science, Education and Sports of the Republic of Croatia at: http://public.mzos.hr/Default.aspx?sec=2545

sport and what are the rules of international sport federations.

II. SPORTS LEGAL AND REGULATORY FRAMEWORK

2.1 European Sport Law

In the European Union member states, but also outside EU, sports law has received an immense attention. In the European Union, the importance of sport was acknowledged with the entry into force of the Lisbon Treaty on 1 December 2009[9], where Article 165 of the Treaty calls on EU to: "contribute to the promotion of sporting issues, while taking into account the specific nature of sport, its structures based on voluntary activity and its social and educational function"[10]. Up until the ruling in the Bosman[11] case, where the ECJ ruled that that the sports fall within the scope of EU law as far as it constitutes an economic activity[12], the European Union was not entitled to harmonize national laws and regulations and issue EU regulations or directives. Prior to the Bosman case, the governing bodies of professional sport in EU member states considered themselves either immune from the effects of EU rules on a single market, including competition law, or in some sense 'a special case'[13]. Post-Bosman, EU was now not just concerned with the economic aspects of sport but the regulation aspect of sport as well[14]. Since then, the EU started to apply its law to sporting practices, but with due recognition of their peculiar

[9] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - Tables of equivalences found at" http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT; See also the MEMO/09/531"Explaining the Treaty of Lisbon", Press Release Database/European Commission at: http://europa.eu/rapid/press-release_MEMO-09-531_en.htm?locale=en

[10] Ibid.

[11] With the decision in the Bosman case the ECJ rendered an important judgment on the freedom of movement for sportspeople and exerted simultaneously a profound effect on the transfer rules of football leagues within the EU. The verdict banned as well restrictions against non nationals within the national leagues and allowed professional football players in the European Union to move to another club without a transfer fee at the end of their terms of contract with their present team (refer to Guide to EU Sport Policy published by EOC EU Office).

[12] See Walrave and Koch case (1974)

[13] November 2013. Bosman Case. [online]. Available from: http://www.lawteacher.net/free-law-essays/sports-law/bosman-case.php?cref=1

[14] UK Essays. November 2013. European Sports Law. [online]. Available from: http://www.lawteacher.net/free-law-essays/sports-law/european-sports-law.php?cref=1

characteristics.[15] Herewith, the EU Sports Law has emerged mainly from the jurisprudence of the European Court of Justice and in deciding whether a sporting rule is compatible with EU Law, the Court takes a case-by-case basis approach by taking into account 'peculiar characteristics' of professional sport. [16]

The White Paper[17] which dates back before the Lisbon Treaty addressed sport related issues in a comprehensive manner where the European Commission aimed at explaining the application of EU law to sport and aimed at setting out further sports-related actions at EU level[18]. The term "specificity of sport" refers to the special characteristics of sport recognized in the Nice Declaration on Sport of December 2009[19]. The White Paper also provides for a meaning of the "specificity of sports", and according to it, the specificity of European Sport can be approached through "two prisms"[20]. First, it acknowledges that sport is subject to the application of EU law, particularly as far as it constitutes an economic activity, and secondly it is subject to other important aspects of EU Law, such as the prohibition of discrimination on grounds of nationality, citizenship of the Union and Equality between man and women in employment[21].

In 2011, the European Commission published its Communication "Developing the European Dimension in Sport"[22], which is legally non-binding document, and it contemplates the White Paper on Sport (2007) and sets out the Commission's view on how the provisions of Article 165

---

[15] Stephen Weatherill, ''European Sports Law: Collected Papers'', 2nd ed., ASSER International Sports Law Series, pg. 298

[16] See also C-519/04 P - David Meca-Medina, Igor Majcen v Commission, judgment of 18.7.2006. In this case, the Court of Justice confirmed that rules on sport are subject to Community law in so far it constitutes an economic activity. If those rules do not constitute restrictions on freedom of movement of persons and freedom to provide services because they concern questions of purely sporting interest, that fact does not mean that the sporting activity in question neccessarily falls outside the scope of the Community rules on competition.

[17] White Paper - White Paper on Sport {SEC(2007) 932} {SEC(2007) 934} {SEC(2007) 935} {SEC(2007) 936} /* COM/2007/0391 final */ found at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52007DC0391

[18] Ibid.

[19] See Prof. dr. Robert Siekmann, "The Specificity of Sport: Sporting Exceptions in EU Law", Zbornik radova Pravnog fakulteta u Splitu, god. 49, 4/2012., pg.700-704 found at file:///C:/Users/lplakollikasumi/Downloads/zb201204_697.pdf

[20] Ian Blackshaw, ''The specificity of sport and the EU White Paper on Sport: Some comments'', TCM Asser Institute in the Hague.

[21] Ibid.

[22] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Developing the European Dimension in Sport, Brussels, 18.1.2011 COM(2011) 12 final found at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0012:FIN:en:PDF

of the Lisbon Treaty[23] should be put into practice. The Communication proposes concrete actions for the Commission and/or Member States within three chapters: the societal role of sport, the economic dimension of sport and the organization of sport[24]. The Communication also stresses that good governance is a condition for the self-regulation and autonomy of the sports sector[25].

On 21 May 2014, the European Council and Representatives of the Governments of the Members States, in a meeting within the Council adopted a Resolution on the European Union Work Plan for Sport (2014-2017).[26] The Work Plan recognizes the need to continue cooperation on sport in EU context established after the entry into force of the Lisbon Treaty, and a need for the EU to work closely with sport movement and relevant competent organizations at national, European and international levels such as the Council of

[23] Article 165 of the Lisbon Treaty provides: "The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity. The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.Union action shall be aimed at: developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States, encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study, promoting cooperation between educational establishments, developing exchanges of information and experience on issues common to the education systems of the Member States, encouraging the development of youth exchanges and of exchanges of socio-educational instructors, and encouraging the participation of young people in democratic life in Europe, encouraging the development of distance education. developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe. In order to contribute to the achievement of the objectives referred to in this Article,: the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States, the Council, on a proposal from the Commission, shall adopt recommendations".

[24] Ibid. fn. 7, Guide to EU Sport Policy and refer to: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011DC0012

[25] See Michaël Mrkonjic, "Sports organizations, autonomy and good governance", Working paper for Action for Good Governance in International Sports Organizations (AGGIS) project/Danish Institute for Sport Projects

[26] Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, of 21 May 2014 on the European Union Work Plan for Sport (2014-2017) found at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:42014Y0614%2803%29

Europe and World Anti-Doping Agency (WADA), in particular through the structured dialogue.[27]

In the European Union, sports is organized in a pyramidal system of national federations, whereby usually only one federation per member state is linked together in the European and international federations. The clubs and players form the foundation of this pyramid. The regional and national federations form the mid layer of the pyramid. National federations regulate all general matters within their discipline and at the same time represent their branch in the European or international federations. At the top of the pyramid are European federations[28] UEFA is for instance the governing body for football in Europe and is placed almost at the top of the pyramid, whereas FIFA is an international federation, which is at the top of the pyramid. Overall, European Union works with Member States and sport bodies to improve how sport is governed around Europe, by tackling big threats such as match-fixing, doping, violence, corruption and racism. It also encourages sport organizations-from local teams to international federations-to embrace the principles of democracy, transparency, inclusiveness, accountability and gender equality[29]. EU law as we know it has a crucial impact on sports-related matters and it is directly binding on all member states, and many non-European countries[30].

2.2 Council of Europe

Apart from the European Union, the Council of Europe, which is an inter-governmental organization, was the first international body to establish legal instruments and offer an institutional framework for the development of sport at the European level. The Council of Europe and the European Union share the same fundamental values – human rights, democracy and the rule of law – but are separate entities, which perform different, yet complementary, role.[31] Council of Europe is an international organization in Strasbourg, which comprises 47 countries in Europe and it was set up to promote democracy and protect human rights and the rule

[27] Ibid. Article III point 13

[28] Ibid. fn.4

[29] Sport in the EU, European Commission found at: http://ec.europa.eu/sport/library/documents/eu-sport-factsheet_en.pdf

[30] See Jean Loup Chappelet, "Autonomy of Sport in Europe", Sports policy and practice series, Council of Europe Publishing, April 2010, pg.40

[31] See more at The Council of Europe and The European Union: different roles, same values" at Council of Europe webpage at: http://www.coe.int/en/web/portal/european-union

of law in Europe[32]. The EU currently has 28 members that have delegated some of their sovereignty so that decisions on specific matters of joint interest can be made democratically at European level. No country has ever joined the EU without first belonging to the Council of Europe.[33]

European Sports Ministers in 1975 launched the European Sport for all Charter, which was officially adopted in 1976. Based on the principles laid down in the "European Sport for all Charter", the European Sport Charter was adopted in 1992 and revised in 2001 and its aim was to provide a common set of principles for all Europe[34]. The European Sport Charter was complemented by the Code of Sports Ethics and it sets out responsibilities for governments, sports-related organizations and individuals.[35]

The action of the Council of Europe aims to fight against the negative aspects of sport - in particular violence, doping and manipulation of sports competitions - through three Conventions: the European Convention on Spectator Violence, the Anti-Doping Convention and the Convention on the Manipulation of Sports Competitions.[36] The European Convention on Spectator Violence aims to prevent and to control spectator violence and misbehavior as well as to ensure the safety of spectators at sports events[37]. The Anti-Doping Convention aims at promoting the national and international harmonization of the measures to be taken against doping, and each contracting party undertakes to create a national coordination body; reduce the trafficking of doping substances and the use of banned doping agents; reinforce doping controls and improve detection techniques; support education and awareness-raising programs; guarantee the efficiency of sanctions taken against offenders; collaborate with sports organizations at all levels, including

[32] For more, refer to: https://www.coe.int/en/web/about-us/do-not-get-confused?desktop=true

[33] Ibid.

[34] See "Enlarged Partial Agreement on Sport (EPAS)" found at: http://www.coe.int/t/dg4/epas/resources/charter_en.asp and http://www.isca-web.org/english/leaders/councilofeurope0/sportandthecouncilofeurope

[35] Recommendation No. R (92) 14 REV of the Committee of Ministers to Member States on the Revised Code of Sports Ethics (adopted by the Committee of Ministers on 24 September 1992 at the 480th meeting of the Ministers' Deputies and revised at their 752nd meeting on 16 May 2001

[36] See CoE Sport Conventions at: http://www.coe.int/t/DG4/sport/default_en.asp

[37] ETS No.120 European Convention on Spectator Violence and Misbehaviors at Sports Events and in particular at Football Matches, at: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/120

at international level and to use accredited anti-doping laboratories[38].

On May 2007, the Council of Europe adopted Resolution CM/Res(2007)8 establishing the Enlarged Partial Agreement on Sport (EPAS), which provides a platform for intergovernmental sports cooperation between the public authorities of its members states and it also encourages dialogue between public authorities, sports federations and NGOs[39]. One of its achievements was the Convention on the Manipulation of Sports Competitions. The Convention was opened for signature on 18 September 2014 and only Norway and Portugal have ratified it, and 26 other member states have signed it. A minimum of five ratifications are required for the Convention to enter into force. The aim of the Convention, as the name suggests, is to fight sport manipulation and corruption in sports. The Convention provides for common definitions and international cooperation mechanisms in this regard.[40]

One of the recent works of the Council of Europe is the Convention on an integrated safety, security and service approach at football matches and other sports events, which was adopted by the Ministers' Deputies on 4 May 2016 and was opened for signature on 3 July 2016.[41]

2.3 International Sport Federations

International Sport Federations are international non-governmental organizations recognized by the International Olympic Committee (IOC) as administering one or more sports at world level.[42] International Sports Federations that seek IOC recognition must ensure that their statutes, practice and activities conform with the Olympic Charter[43]. The summer federations, the winter federations and the recognized federations have formed respective associations

[38] ETS No. 135 Anti-doping Convention found at: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/135

[39] Enlarged Partial Agreement on Sport (EPAS) Factsheet found at: http://www.coe.int/t/dg4/epas/Source/Ressources/2016/10%20Factsheet%20EN_%20EPAS_2016.pdf

[40] CETS No.215, Council of Europe Convention on the Manipulation of Sports Competitions found at: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/215/signatures?p_auth=wF13M7Lo

[41] See Council of Europe Treaty Series - No. [218], Council of Europe Convention on an integrated safety, security and service approach at football matches and other sports events found at: http://www.coe.int/t/dg4/sport/Source/T-RV/Adopted%20version_Convention%20Safety%20Security%20Service_EN.pdf

[42] See https://www.olympic.org/football

[43] See Olympic Charter found at https://stillmed.olympic.org/Documents/olympic_charter_en.pdf

such as the Association of Summer Olympic International Federations (ASOIF), the Association of International Olympic Winter Sports Federations (AIOWF) and the Association of IOC Recognized International Sports Federations (ARISF). Federation Internationale de Football Association (FIFA), Federation Internationale de Basketball (FIBA), International Handball Federation (IHF) and many others are international federations recognized by IOC, to which Kosovo is a full member[44]. The IOC reserves the right to withdraw its recognition of National Olympic Committees (NOCs) and International Federations which fail to comply with the Olympic Charter, its code of ethics or the World Anti-Doping Code.

2.4 Kosovo Sport Legislation

The current legislative framework in the field of sports in Kosovo consists of the Law No. 2003/24 on Sports, amended and supplemented by the Law No. 04/L-075 on amending and supplementing the Law No. 2003/24 on Sports[45]. The Law is obsolete and falls short in laying down basic principles and describing the rules for proper functioning of a national sports system. It is based on UNMIK Regulations and does not reflect or comply any longer with the reality in Kosovo that emerged since its Declaration of Independence in February 2008. In terms of its implementation, a number of by-laws[46] have been enacted, and the Sports Department within the Ministry of Culture, Youth and Sports (MCYS) has been vested with the authority to prepare, assess and approve policy programs in the field of sports. In practice, however, the situation is different and the current regime does not provide the desirable context for a sound and sustainable national sports system and for advancement of sport in Kosovo. In addition, the Law No.04/L-57 on Freedom of Association in Non-Governmental Association is also a source of Kosovo sports law given the fact that most of the

[44] For more please see: https://en.wikipedia.org/wiki/Membership_of_Kosovo_in_international_sports_federations

[45] See the Official Gazette of the Republic of Kosovo found at http://gzk.rks-gov.net/ActDetail.aspx?ActID=2490

[46] Administrative Instruction 03/2005 on the sports medical institute; Administrative Instruction No. 05/2005 on supervision of administrative and professional work in sport clubs and federations; Administrative Instruction on establishment and registration of public and private sport clubs; Administrative Instruction for organization and functioning of the Kosovo Olympic Association, and the Administrative Instruction on registration and licensing of sport federations and associations in Kosovo, all found at http://www.mkrs-ks.org/?page=1,57

football clubs and national federations in Kosovo are organized as non-governmental organizations[47].

Currently in Kosovo, there are over thirty sports federations, and each federation is licensed for a single discipline by the MCYS. Each federation has its own statute, and rules to which national sports clubs, and athletes must adhere to. Some of these federations are part of European and international federations, such as the Kosovo Football Federation, which has been admitted to UEFA and FIFA; Kosovo Basketball Federation, which is full member of FIBA as of last year etc. All these federations are part of the National Olympic Committee, which is a full member of the International Olympic Committee (IOC) as of this year.

From what has been explained above, when speaking about approximation of Kosovo sports law with the European Sports Law, one should think of the harmonization with Community law by taking into account specificities of sport. The Kosovo Sports Law falls short in laying down basic sports principles, or put differently, it touches upon them superficially thus providing fairly vague formulations. The principle of voluntary participation in sport is one of the most important principles and it should be boldly emphasized. In addition, the current law does not provide sufficient basis for construction and maintenance of sports facilities, education and training of experts, scientific projects in the area of sport, economic measures, advancement of partnership between governmental and non-governmental sport organizations and private entrepreneurship.

The law needs to provide sound basis for creation of a National Sports Program that would include programs that create conditions for sporting activities in the educational system, recreational sporting activities. This is in line with what the European Union calls for more extensive interaction between sport and education across Europe. [48]Article 16 of the current law only provides that sport education bears special national values but fails short of translating this into a concrete program and designating a concrete body to carry out the program.

The Kosovo Sports law does not contain clear provisions on the persons in the sports system and it does not make any distinction between the natural and legal persons. It further does not contain provisions with regard to types of legal

[47] There are some initiative going on with regard to changes in the status of national football clubs and the option of switching from NGOs to private football clubs, see more at: http://zeri.info/sport/91814/klube-biznesi/

[48] For more, go to:
http://ec.europa.eu/sport/policy/societal_role/education_training_en.htm

persons and does not define whether private companies and/or institutions fall within this category. To this end, modern sport laws contain provisions on sport joint stock companies for sport clubs[49]. With regard to natural persons, the law does not have provisions for treating separately athletes, coaches and sport managers.

Kosovo needs to develop robust governance mechanisms to be maintained by national sport associations that promote transparency and integrity and that stay away from corrupt activities and match-fixing practices. Further, since equality between women and men is a fundamental principle of the European Union, legislative changes must also take into account and address the gender gap in decision making in sporting institutions. The law must be harmonized and brought in line with the Council of Europe standards laid down in its conventions, as well as anti-doping requirements of both Council of Europe and other international bodies such as UNESCO.

III. SPORTS ARBITRATION

3.1 General Observations

In the wake of many changes, Kosovo will also need an efficient sports dispute management mechanism for dealing with unique type of conflicts. Article 25 of the Kosovo Sports law provides that the organizational structure of the Kosovo National Olympic Committee (NOC) shall include the Committee for Arbitration in Sport (CAS), which operates in accordance with international applicable sport arbitration acts and standards. National Olympics Committees such as Kosovo NOC are bodies independent from its country's government with the exclusive power to send teams and athletes to participate in the Olympic Games.[50]

Article 26 of the Kosovo Sports law provides that the Committee for Arbitration in Sport shall function within

[49] Articles 28-30, Croatian Sports Act; See also, Macedonian model: "This is a measure that enables application of European and global experiences, regulating the ownership of clubs, attracting more sponsors and private companies to invest in sports clubs, creating professional leagues and improving their organization in general", found at: http://www.invest-in-macedonia.com/sport/1296930300-sports-clubs-to-be-transformed-into-joint-stock-companies.html

[50] See Olympic Charter and Viktoriya Pashorina-Nichols, "Is the Court of Arbitration for Sport Really Arbitration?",
LLM Research Paper Laws 521: International Arbitration & Dispute Settlement, Victoria University of Wellington

Kosovo National Olympic Committee (NOC) in accordance with relevant acts of ICAS. In practice, though, it is not yet functional. ICAS stands for the International Council of Arbitration for Sport which has under its administrative and financial authority the Court of Arbitration for Sport (CAS), an institution independent of any sport organization which provides services in order to facilitate the settlement of sports-related disputes through arbitration or mediation by means of procedural rules adapted to the specific needs of the sports world[51]. CAS is an institution independent of any sports organization, which provides for services in order to facilitate the settlement of sports-related disputes through arbitration or mediation by means of procedural rules adapted to the specific needs of the sports world[52].

The CAS was created in 1984 and is placed under the administrative of financial authority of the International Council of Arbitration for Sport (ICAS). The CAS has nearly 30 arbitrators from 87 countries, and it registers around 300 cases every year,[53] and is regarded as the "supreme court of world sport"[54]

With the commercialization of sports the need for developing sport dispute settlement methods became bigger and bigger. Given that the sports industry is estimated to account for between 3 and 6 per cent of total world trade, it comes as no surprise that it is also a major source of legal disputes.[55] The relationship between an athlete and his or her club, between clubs and federations, and between national and international federations is contractual in nature. Through his or her membership with a particular club, an athlete is granted a license, by a federation to which the club belongs, which allows the athlete to participate in the various events the federation organizes.[56]

Apart from CAS, there are a number of other international sports federations that have their own system of dispute resolution and appoint tribunals for the resolution of

[51] For more, refer to the official webpage of the Court of Arbitration for Sport (CAS), Frequently Asked Questions (FAQ), found at: http://www.tas-cas.org/en/general-information/frequently-asked-questions.html

[52] Ibid.

[53] For more refer to the CAS official website http://www.tas-cas.org/en/general-information/frequently-asked-questions.html

[54] Juan Antonio Samaranch quoted in H E Judge Kéba Mbaye "Foreword" in Matthieu Reeb (ed) Digest of CAS Awards II 1998–2000 (Kluwer Law International, The Hague, 2002)

[55] Antonio Rigozzi and William McAuliffe Lévy Kaufmann-Kohler, "Sports Arbitration", The European, Middle Eastern and African Arbitration Review 2013 found at http://lk-k.com/wp-content/uploads/RIGOZZI-MCAULIFFE-GAR-Euro.-Middle-East.-and-Afr.-Arb.-Review-2013.pdf

[56] Ibid Pashorina-Nichols at 37

disputes arising in their sport.[57] One example of such a dispute resolution system is the Basketball Arbitral Tribunal (BAT), which was set up by FIBA.[58] On the national level, an increased trend of establishing national sports dispute resolutions bodies can be noticed.

One characteristic of national sports related dispute resolution bodies is that the awards of some of these bodies can be appealed to the CAS if the dispute in question is international in nature, or alternatively they provide for first instance arbitration by a national body, with the possibility to appeal the award to the CAS.[59] In Kosovo, there is a tendency of establishing a national arbitration service controlled by country's national Olympic Committee known as KOC. With regard to this model, the literature suggests that as arguable that the bulk of resources should be dedicated to the establishment of a high-quality 'national CAS' in every country for the resolution of national level of disputes, because if these bodies are established in each individual country and sport, the right of appeal to the CAS could be restricted and the role of the CAS could evolve from that of a body, which rehears appeals on a de novo basis.[60] There can also be problems of perception as to the independence and impartiality of a dispute resolution mechanism that is association with or lies within the sports body that can be an interested party to a dispute.[61] Along with the changes in the legislative framework pertaining to sports, different models of national sports arbitration bodies need to be analyzed and their respective long-term feasibility must be assessed.

Further, while the Kosovo Law on Arbitration No.02/L-75 sets forth rules that apply to arbitration agreements, arbitration proceedings and the recognition and enforcement of arbitral awards made inside and outside of Kosovo, it does not contain any specific provision with regard to sports dispute resolution. Article 5.2 of the Law on Arbitration provides that all disputes related to the civil-judicial and economic-judicial requests may be the subject of an arbitration agreement, unless prohibited by law[62]. Though,

---

[57] Ibid, fn.40 pg.20

[58] See http://www.fiba.com/bat

[59] See examples of national sports-related dispute settlement bodies in France, Australia and United States and also Mark French v Australian Sports Commission & Cycling Australia, CAS 2004/A/651, (Appeal) Award of 11 July 2005

[60] Ibid, fn.40 pg.21

[61] Chik, Kam Wai, Warren Bartholomew. The Case for Sports Law Arbitration and Practice in Singapore. (2007). Singapore Academy of Law Journal. 19, (2), 267. Research Collection School Of Law. **Available at:** http://ink.library.smu.edu.sg/sol_research/793

[62] See, the Kosovo Law on Arbitration No. 02/L-75 found at http://www.kosovo-arbitration.com/uploads/files/Law%20on%20Arbitration.pdfn

as pointed out above, the relationship between different undertakings in sports is contractual in nature, and can therefore fit within the meaning of Article 5.2 of the Arbitration law, still the applicability of this law to sport related disputes remains questionable and opens way for extensive debate. This is mainly because sports-related arbitration has so many features that distinguish it from the commercial or investment arbitration in so many aspects.

3.2 Differentiating features of sports arbitration

Speed, special expertise, consistency and transparency and the ease of enforcement of sports arbitration awards are the main features that distinguish sports arbitration from other commercial and/or investment arbitration. When speaking about speed, one should bear in mind that the sport industry resolves around a series of regular sporting events and competitions, and hence resolution of a sports dispute must be concluded before a particular competition or event takes place.

The "special expertise" in sports arbitration is said to be the most conspicuous feature of the sports arbitration system in combination with speed, and the diversity in the expertise required in sports arbitration is an important factor to bear in mind.[63]

With regard to consistency and transparency, it is worth of mentioning that awards issued by an arbitral tribunal tend to be regarded as authoritative precedent by subsequent arbitral tribunal from the same sports arbitration institution and awards of sports arbitration bodies are mainly published.[64]

Unlike with awards rendered in a commercial arbitration, a sports governing body with mostly comply with arbitral awards thus excluding any reason to resort to the New York Convention for Recognition and Enforcement of Foreign Arbitral Awards. In the event that a sports governing body does not comply with the arbitral award, the enforcement can be sought under the New York Convention.[65]

Other distinguishing feature of sports-related disputes is that they range from football employment disputes, disciplinary measures, to match-fixing and ethical disputes. In fact, the most common type of disputes that arise before

[63] Elliot Geisinger, Elena Trabaldo –de Mestr, "Sports Arbitration: A Coach for Other Players"- ASA Special Series No. 41, pg. 38

[64] Ibid. Rigozzi et al., pg.17

[65] Ibid. pg.18

the CAS relate to termination of employment contract of players or coaches, or the movement of players between clubs[66]. Since the arbitrability of employment related disputes is excluded by different laws, or is not clearly foreseen, if considered as regular employment contracts, the recognition and enforcement of arbitral awards could be at risk. Hence, creating a separate sports arbitration requires amendments to many acts. [67] All in all, the disputes resolved by sports arbitration bodies are quite diverse in nature, and can vary between purely commercial disputes in a sporting context, to very sport-specific disputes concerning actions or incidents arising on the field of play.[68] Sporting practices have peculiar nature and so do sports-related disputes.

IV. CONCLUSIONS

Kosovo needs a solid legislation in the field of sports that is practicable and can be easily implemented in practice. The sports legislation must be upgraded to the level as to enable further development of sports in Kosovo by harmonizing it with relevant EU and international standards and requirements deriving from internal regulations of the International Olympic Committee and international federations.

Main elements to be incorporated in the new legislation pertain to governance issues of national sports associations and match-fixing practices, anti-doping requirements and national sports program. The law and the secondary legislation must foresee and provide for sound implementation mechanisms as well as a forum where national sports associations, sport clubs and athletes can resolve their potential disputes in a speedy and cost-effective manner. To this end, different models of national sports arbitration bodies must be explored and solutions that suit the best the needs of Kosovo must be applied. The legal basis for resolving sports related disputes must be measured and addressed, as the current arbitration law in Kosovo does not contain any provisions related to sports arbitration.

Kosovo has outstanding athletes, and they deserve good laws, which in turn establish sound sports systems. Good laws and sound enforcement mechanisms will enable our

[66] See "Sport Arbitration", Ukranian Arbitration Association found at http://arbitration.kiev.ua/en-US/Industry-arbitrations/Sport-arbitration.aspx?ID=493
[67] Ibid.
[68] Ibid.pg.19

athletes to further develop and excel in the world of sports and will assist Kosovo in strengthening its national identity and international recognition.

PUBLISHER
Arbitration Center at American Chamber of Commerce in Kosovo

November 2016

Universal Decimal Code
(UDC) 341.6 (05)

AMERICAN CHAMBER OF COMMERCE IN KOSOVO
ODA EKONOMIKE AMERIKANE NË KOSOVË

ARBITRATION CENTER
QENDRA E ARBITRAZHIT

Cover and back page designed by: Freepik.com