

# Succession of Arbitral Institutions

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*The paper examines the impact of state transformation (succession, merger) on the validity of arbitral clauses that provided arbitration administered by institutions that operated within sponsoring organizations that were transformed or abolished. In the first part, theories on the function of arbitration institutions are presented, as well as main features of institutional arbitration in former socialist countries. After that, succession cases, involving arbitral institutions from former countries: Soviet Union, Czechoslovakia, DDR and Yugoslavia are outlined. Finally, the author presents possible approaches to succession cases and proposes solutions to them.*

## **Institutional arbitration - the challenge of succession**

Institutional or administered arbitration was usually regarded as an area which is suitable for daily routine and practice, not for theory and intellectually challenging problems. Until the 1990s, it seemed that everything was settled in this widespread type of arbitral dispute settlement. Very few cases and/or papers dealt seriously with the nature and meaning of *institution* in institutional arbitration and, since everything seemed to be going well, most of the works which mentioned institutional arbitration were generally devoted to (self)promotion and advertisement of arbitral services.<sup>1</sup>

Suddenly, with the fall of Berlin wall and lifting of the Iron Curtain, everything changed. *Institution* and its role in arbitration became the decisive issue in a series of far-reaching cases: the transformation (dissolution, succession and mergers) of states led to the transformation of certain framework organizations which provided, among other things, arbitration services. Consequently, the

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<sup>1</sup> A few papers break this general rule. See e.g. Melis, *Function and Responsibility of Arbitral Institutions*, in *COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS* 112. See also Michael F. Hoellering, *The Role of Arbitration Institutions In Managing International Commercial Arbitration*, 1994 *DISPUTE RESOLUTION JOURNAL*.

identity of the arbitration institutions which operated within such framework organizations came into question, and suddenly, a series of arbitration agreements that provided institutional arbitration became questionable. The result was a nightmare for potential claimants and a splendid opportunity for skillful defendants to challenge arbitration (and/or litigation) and delay or stall the process. In this paper, several cases are presented which will show the magnitude of the problem, and the variety of instances in which it appears. The cases presented will be those connected to the dissolution of the Soviet Empire; the division of Czechoslovakia; the reunification of the Germanies; and the disintegration of Yugoslavia.

It can be argued that today there are few other issues in international commercial arbitration - at least with regard to arbitration involving Central and Eastern European countries and the former Soviet Union - which deserve more attention and discussion. This paper outlines the problems, and attempts to give some guidelines for their solutions. But, before embarking on a discussion of succession cases, it is necessary to address the background: institutional arbitration and its forms.

### **“Cradle theory” and “guardian theory”**

Whatever was argued by the proponents of institutional arbitration to increase the appeal of institutional arbitration and a particular arbitration institution, the prevailing attitude was that the element “institution” is something secondary and negligible, whereas the only thing that really mattered were the relations of parties and arbitrators. Institutional arbitration was insofar viewed -- especially from the Western point of view -- as an occasionally helpful framework for the development of the arbitral process, which was, in theory, managed exclusively by the parties and/or arbitrators. This attitude, which will be called “cradle theory”, perceives *institution* as a place which maintains administrative services and support needed for the maximum comfort of all participants in arbitration -- but with no significant legal prerogatives. Such a theory may be best seen, for instance, in the AAA General Counsel’s statement that “an institution’s mission in the management of proceedings is to provide maximum administrative and organizational support so that the arbitrators can effectively and efficiently perform their own critical function.”<sup>2</sup> The same attitude prevailed in most industrial countries in which arbitration was always seen dominantly in light of its function as a method of private dispute resolution: as an expression of fundamentally unlimited and genuine freedom of the parties (or, if put in more general terms, of civil society as such) to care for their (business) affairs.<sup>3</sup>

<sup>2</sup> Hoellering, *The Role of Arbitration Institutions*, at 6 (excerpt).

<sup>3</sup> See RENÉ DAVID, *ARBITRATION IN INTERNATIONAL TRADE* 55 (on views on arbitration as an innate right of individuals). On the sources of such an approach, David quotes French Constitu-

However, what is considered self-evident in the world of private market economies and liberal democracies may not be so self-understood in another setting. Whereas American and some West European arbitration institutions are in fact no more than private associations, comparable to interest-groups and lobbies freely founded by their members, in other countries arbitration institutions were and still are provided by law, vested with a broad monopoly on the arbitration scene, and maintained in a close connection to bodies which had an intimate connection to the government and other state institutions. Therefore, the second approach, which will be called “guardian theory”, primarily views arbitration institutions as holders of power transferred to them by the state judicial system. As “quasi-courts”, they do, in fact, provide some freedom and assistance to parties and arbitrators, but only because it is ordered by the higher authority of the state. In keeping with this, every discussion by the proponents of this approach begin with a careful attempt to draw a line between welcome and necessary limitations imposed on the arbitral process, and unnecessary and harmful bans that have to be generously lifted by the amicable *placet* of the state authorities.<sup>4</sup>

The history of arbitration provides ample examples of the merger between state judicial prerogatives and autonomous mechanisms of dispute resolution. From the European perspective, two fairly common and typical examples can be used as circumstantial evidence for the previous statements. One need not go far: it is enough to examine the names of most of the European arbitration institutions to establish that a) a significant number of them refer to themselves as “courts” and b) operate within a broader institution which is vested with public prerogatives, such as chambers of economy (commerce).<sup>5</sup> Even the linguistic particularities contribute to the confusion of arbitration with a litigation before “state courts”: if an arbitral award is rendered by an arbitral tribunal in an institutional arbitration, it is frequently referred to as an award made by the *court*, not by *arbitrators*. Though in theory the latter may be very clear, some languages blur this distinction by ambiguity. So, for example, the German word *Schiedsgericht* or Croatian word *sud* may denote both arbitral tribunal and arbitration institution.<sup>6</sup>

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tions of 1791 (on inalienable “citizen’s right to reach a final settlement of their disputes through the means of arbitration”) and 1794 (“No restriction whatever can be imposed on the right of citizens to have their disputes settled by arbitrators of their own choice”). *Cf. also* Constitutions of El Salvador, Venezuela, and a number of Swiss cantons that still follow a similar pattern.

<sup>4</sup> *Cf. id.* at 56 (on an interpretation that advocates a kind of inherent right of State Courts to settle disputes of legal nature).

<sup>5</sup> In the system that is often found in Europe, chambers of commerce/economy are organizations that have compulsory membership and perform a series of important tasks that are parallel to the tasks of governmental agencies, such as the Ministry of Commerce.

<sup>6</sup> Some of the latest proposals, including the draft Croatian Arbitration Law presented in this volume attempt to avoid this confusion by introductory (or concluding) definitions in which a

The above distinction between “cradle theory” and “guardian theory” will become more relevant upon examination of the possible impact of the changes of institutional identity in the period from the conclusion of the arbitration agreement to the initiation of proceedings, and afterwards: during the course of the proceedings, and later, until final enforcement of the award.

Obviously, several different variations of this question could arise from possible permutations of the factors. Before going into detail, it is important to note that “guardian theory”, although possibly linked to the Western heritage of legalism, formalism and conservatism and/or state paternalism, had a particular meaning within the socialist countries. Therefore, a few words on the peculiarities of institutional arbitration in former socialist countries are in order. As the further course of the argument will show, it is not only matter of historiography.

### **Institutional arbitration in socialist countries: main features**

Whereas domestic arbitration (arbitration between entities of national law) was generally banned, international commercial arbitration had a certain privileged position in former socialist countries. Both things follow logically from the structure of socialist economy. In domestic relations, where free trade virtually did not exist, and planning agencies determined all the relations, arbitration did not make any sense, because a final “arbitrator” was always a state or para-state agency (e.g. communist party) that had a superordinate position, and was able to interfere and resolve the eventual disagreements by dictate based on the current political interests.<sup>7</sup>

On the other hand, the necessity to participate in international trade was soon realized, even in some of the most isolationist socialist countries. In such relations -- especially with regard to trade deals with capitalist countries -- at least one party was not under direct state political influence, and that made room for contractual freedom and equality in the parties' relations. In addition, since in East-West trade relations parties rarely had confidence in each other's courts, arbitration was the only logical choice. However, it required the existence of at least apparently competent and neutral private mechanisms of arbitral settlement in order to persuade the other party to conduct arbitration there. For a socialist

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tentative new terminology is introduced. *See e.g.*, Art. 2 of Draft Proposal and Art. 49 of ZAGREB RULES.

<sup>7</sup> A link between the structure of economy and arbitration regulations may well be illustrated by the example of former Yugoslavia. Whereas in other socialist countries the planned state economy made domestic arbitration impossible, relative (although very limited) autonomy of “self-governed” Yugoslav corporations since 1963 enabled the legalization and development of a relatively significant practice of internal (domestic) arbitration.

country, with a strong tradition of comprehensive state control, it was not an easy task.

Some freedom was, therefore, allowed, especially to arbitrators. But, the approach to arbitration was twofold: while in socialist countries, “genuine” voluntary arbitration was viewed as a kind of concession to foreign partners, arbitration institutions were treated as para-governmental organs that bound by the obligation to maintain decisional independence (and/or its appearance), but remained more or less connected to the structures of political power.

Arbitration was therefore always walking on the edge of voluntary and compulsory. In the Soviet Union and other bloc countries, “arbitration courts” were, in certain periods, courts of wholly mandatory jurisdiction.<sup>8</sup> After the transition, some of them were transformed into commercial courts. Even in instances which more greatly resembled “genuine” voluntary arbitration, there were strong limitations and restrictions. Within the COMECON countries, members of the Moscow Convention, arbitration was provided by law, not by parties’ agreement.

International commercial arbitration between countries of both blocs -- in fact, the only type of arbitration in the East that had all of the characteristics of “genuine” arbitration -- was centralized and monopolized, reflecting the socialist fashion of centralism and state control. The pattern of some Western countries where arbitration institutions were organized at chambers of commerce was readily adopted. *Ad hoc* arbitration was strongly discouraged or banned. Since there was, usually, only one chamber at the state level in which state prerogatives and control with respect to foreign trade were concentrated, there was only one arbitration institution that dealt with international commercial arbitration.

In spite of the numerous limitations, the institutional arbitration at such arbitral centres developed a relatively high level of skill and quality of arbitration services. In trade relations with the West, the need to maintain international prestige and to attract foreign investments prevented state interference in arbitration proceedings. Operating on the margins of foreign trade chambers, some arbitration institutions produced noted arbitrators who gained significant international reputation. The support provided by bureaucratized structures of sponsorship organizations was still limited, and the arbitration institutions fre-

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<sup>8</sup> See Komarov’s explanation of the essence of “state arbitration courts”: “It is necessary [...] to mention that in Russian legal terminology the term ‘arbitration’ is used to denote not only the traditional dispute-settlement method which means consensual, private, out-of-court procedure. The same term is applied also in Russia to the procedure in the special economic courts unfortunately called ‘arbitration courts’ as well [...] for deciding disputes mainly between state enterprises [...]” Komarov, *International Arbitration in the Russian Federation*, Report at Seminar *Aktuelles aus der internationalen Schiedsgerichtsbarkeit in Zentraleuropa* (Vienna, 9-10 September 1993) at 12 (on record with Vienna Arbitral Centre).

quently seemed to be a foreign body. Equality of conflict-resolution-mechanisms was in sharp contrast to the hierarchical layers of administrative powers vested in the economic chambers that actually functioned as a mere transmission of state directives and control.

### **Succession Cases: the State, the Clause and the Institution**

This state of affairs radically changed after the fall of the communism. A need to introduce a free market and abolish state-directed economy had its impact on arbitration, too. The reforms went faster or slower, but the general course was one towards the opening of the arbitration services market. Bans on certain types of arbitration (e.g. domestic arbitration) are gradually being lifted, although the speed of the change also caused some problems in an environment of low arbitral culture that was largely unaware of all the pitfalls and dangers those who are unaccustomed to contracting and participating in arbitration might encounter.

This process would have run its natural course in the absence of another factor: some states changed not only their political and economical systems, but also their identity. Mostly, former federal structures that were kept together by communist bonds (Soviet Union, Czechoslovakia, Yugoslavia) dissolved into independent states; in the case of the former German Democratic Republic, the fall of communism enabled German re-unification. The impact of these dramatic political changes on the arbitration proceedings and arbitral clauses that referred to the arbitral institutions that existed in those states needs to be examined.

#### *1. Czechoslovakia*

Arbitration services in Czechoslovakia were, as in most other socialist countries, centralized and monopolized at the Czechoslovak Chamber of Commerce and Industry in Prague.<sup>9</sup> During the dissolution of the federal structures, the first new arbitration institutions were founded (e.g., at the stock exchange). Even before the final break of federal ties<sup>10</sup>, a separate Slovak Chamber of Trade and Industry was founded in Bratislava, with an arbitration institution that operated under almost the same rules as the Prague arbitration court.<sup>11</sup> The latter remained,

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<sup>9</sup> See Svetožar Hanak, *Situation in Czechoslovakia*, Report at the Seminar *Resolving Business Disputes Between US and Central European Enterprises; New Developments in Some Former CMEA-Countries* (Vienna, May 21-22, 1992) (on file with the Vienna International Arbitral Centre).

<sup>10</sup> The Czechoslovak federation ceased to exist by a decision of the federal Assembly of November 25, 1992, under which all rights and duties of the CSFR pass to Czech and Slovak Republics from January 1, 1993. See Baumgärtner, *Der Untergang des SCFR und seine rechtliche Bewältigung*, in *ARBEITSPAPIERE DER FOWI* (Vienna 1993).

<sup>11</sup> See Krejci, *Aktueller Stand der internationalen Schiedsgerichtsbarkeit in der Tschechischen Republik*, Report at the Seminar *Aktuelles aus der internationalen Schiedsgerichtsbarkeit in*

however, unchanged for some time, so that even after dissolution of the federation it still operated at the “Czechoslovak” Chamber, but also functioned as the arbitral centre of the new Czech Chamber of Trade and Industry.<sup>12</sup> Later, it underwent another transformation: it became an institution of two chambers, the Czech Chamber of Commerce and the Czech Chamber of Agriculture.<sup>13</sup>

The Prague institution maintained that there was a clear continuity between the former Czechoslovak institution and the present Czech arbitration court, whereas the new Slovak facility for administered arbitration is a new entity that has nothing to do with the arbitral clauses that provided arbitration in Prague. The formal transformation of the “Czechoslovak” arbitration institution happened, however, two years after the disappearance of Czechoslovakia.

The form of transformation was peculiar: by a (Czech) statute No. 223/94 of January 1, 1995, the Arbitration Court at the Czechoslovak Chamber of Trade and Industry became the Arbitration Court at the Czech Chamber of Commerce and Czech Chamber of Agriculture (see § 3). The same section of the (Czech) law provided that “the existing arbitration clauses that provided arbitration at the Czechoslovak [...] Chamber will be deemed to provide arbitration at the Arbitration Court of the Czech Chambers of Commerce and Agriculture” (see § 3/3).<sup>14</sup>

On their part, the representatives of the arbitral centre in Bratislava (mostly former arbitrators of the Prague institution that continued to act as arbitrators at both institutions) were reluctant to disapprove, although it was possible to hear shy voices arguing that from the perspective of the Slovak parties arbitration in Prague is now arbitration in a foreign country<sup>15</sup>, as well as critiques with regard to administrative state regulation of the alleged content of the will of the parties. At the time of the conclusion of an arbitration agreement between, e.g., a Slovak party and a party from a third country, this is hardly something that the Slovak

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*Zentraleuropa* (Vienna, September 9-10, 1993) (on file with the Vienna International Arbitral Centre). The Slovak Chamber was organized by law (Act no. 9/1992). Its § 16 enabled constitution of an arbitration institution within the chamber.

<sup>12</sup> Kalensky, *Aktueller Stand der internationalen Schiedsgerichtsbarkeit in der Slowakischen Republik*, Report at the Seminar *Aktuelles aus der internationalen Schiedsgerichtsbarkeit in Zentraleuropa* (Vienna, September 9-10, 1993) (on file with the Vienna International Arbitral Centre).

<sup>13</sup> See Hanak, *Arbitration in the Czech Republic*, INTERNATIONAL COMMERCIAL ARBITRATION IN EUROPE, SPECIAL SUPPLEMENT, ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN 88-92 (Nov. 94) [hereinafter ICC BULLETIN].

<sup>14</sup> Cf. Klein, *Der aktuelle Stand der Schiedsgerichtsbarkeit in der Tschechischen Republik*, Report at the Seminar *Aktuelles aus der internationalen Schiedsgerichtsbarkeit in Zentraleuropa - Der Wirtschaftsprüfer in Schiedsverfahren* (Vienna, September 19-20, 1996) (on file with the Vienna International Arbitral Centre).

<sup>15</sup> See e.g., Krejci, *supra* note 10, at 4.

party had in mind; and, it is also doubtful whether a Czech legislative body may validly replace the will of the parties (e.g., Slovak) to submit their dispute to arbitration in a certain country, at a specified arbitration centre.

However, it seemed that this issue was avoided for a while in arbitration circles (even in Slovakia), and that everybody wanted to leave its solution to case law (partly, perhaps, because a number of Bratislava arbitrators continued to arbitrate in Prague). Maintaining the status quo was encouraged by the fact that arbitral awards issued in Czech, i.e. Slovak Republic continued to be enforced in the other country.<sup>16</sup>

## 2. Soviet Union

The Soviet Union was the country that largely set the trends and models of arbitration in the other socialist countries. The system of compulsory State Commercial Arbitration Courts was broadly utilized in the USSR: they existed in every Soviet republic. With regard to "proper" arbitration institutions, there were only two of them, both seated in Moscow and operating under the auspices of the USSR Chamber of Trade and Industry: the Court of International Commercial Arbitration<sup>17</sup> and the Maritime Arbitration Commission<sup>18</sup>. After the fall of the Soviet Union, those institutions continued to perform services at the Chamber for Trade and Industry of the Russian Federation.<sup>19</sup> The Arbitration Rules of both institutions remained unchanged.

The Soviet case is in certain aspects different from the Czechoslovak one, in particular because the Russian Federation was recognized as the sole successor of all rights and obligations of the former union. That gave the representatives of the Moscow institution a chance to express their firm opinion on the succession

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<sup>16</sup> On enforcement of arbitral awards and the new Arbitration Act of August 1996 see Brda, *Der aktuelle Stand der Schiedsgerichtsbarkeit in der Slowakischen Republik*, Report at the Seminar *Aktuelles aus der internationalen Schiedsgerichtsbarkeit in Zentraleuropa - Der Wirtschaftsprüfer in Schiedsverfahren* at IV (Vienna, September 19-20, 1996) (on file with the Vienna International Arbitral Centre).

<sup>17</sup> Established in 1932, until 1988 named Foreign Trade Arbitration Commission.

<sup>18</sup> Established in 1930.

<sup>19</sup> The powers of the USSR Chamber were transferred to the RF Chamber by a decree of the Supreme Soviet from January 1993. The same decree also confirmed the status and the continuity of the arbitration "courts" at the Chamber. See also the Russian Law on International Commercial Arbitration of July 7, 1993, and Komarov, *Russian Federation Legislation on International Commercial Arbitration*, in ICC BULLETIN - SUPPLEMENT 117-121; Komarov, *International Arbitration in the Russian Federation*, Report at the Seminar *Aktuelles aus der internationalen Schiedsgerichtsbarkeit in Zentraleuropa - Der Wirtschaftsprüfer in Schiedsverfahren* at IV (Vienna, September 9-10, 1993) (on file with the Vienna International Arbitral Centre).



issue. So the President of the CICA (with regard to the Decree of the Presidium of the Supreme Soviet of the RF of January 1993):

It is important to underscore that this act did not changed [sic!] in any aspect the status of the arbitration institutions. It meant no kind of reorganisation of them either. So, all arbitration agreements referring to the institutions at the USSR Chamber of Commerce and Industry were still valid since the dispute settlement institutions provided for in these agreements continued their activities even though under changed name. This approach was reflected in the practice of the arbitration institutions.<sup>20</sup>

The same approach was taken for the new Rules of the CICA, in effect from May 1, 1995.<sup>21</sup>

In the meantime, new international arbitral centres began to arise in the other states that emerged from the Soviet Union, first in the Baltic States, then in the Ukraine and Moldova.<sup>22</sup> Most of those arbitration institutions followed the former Soviet pattern -- they were established at the central state level, at the respective commercial chambers. Some of the new arbitral centres were almost a mirror copy of Moscow centres: for example, the new International Commercial Arbitration Court founded at the Chamber of Trade and Industry of Ukraine in 1992 was in 1994 transformed into two centres, whose names and rules almost literally followed the Russian CICA and MAC.

There are very few publications that present opinions on the further validity of the arbitration clauses that provided "arbitration in USSR" under some Chamber's rules in the new independent countries. The new centres had enough problems with establishing their own operation without entering into debate with Moscow's statements. There are, however, some indications that the apodictic approach of CICA/MCA was not followed without reserves outside the Russian Federation, and that some of the new centres tried to assume jurisdiction in certain cases in which the former USSR arbitration clause was asserted. There are also statements to the contrary.<sup>23</sup>

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<sup>20</sup> Komarov, *supra* note 8, at 3. Cf. also Komarov, Report at Vienna Seminar 1996, at 6.

<sup>21</sup> See Komarov, *Russische Föderation: Schiedsordnung des Internationalen Handelsschiedsgerichts bei der IHK der RF*, 8 WIRTSCHAFT UND RECHT IN OSTEUROPA (WIRO) 300 (1995).

<sup>22</sup> See Halmägi, *Estonia: the first steps in arbitration*, in ICC BULLETIN (SUPPLEMENT) 93; Lindemeyer, *Moldavia's new arbitration law*, ICC BULLETIN (SUPPLEMENT) 99; Pobirtschenko, *International commercial arbitration in Ukraine*, ICC BULLETIN (SUPPLEMENT) 126; Pobirtschenko, *Internationales Schiedsgericht bei der Handels- und Industriekammer der Ukraine*, Report at Vienna Seminar 1993.

<sup>23</sup> See e.g., Pobirtschenko, Ukrainian Report at Vienna Seminar 1996, at 4. The argument is, however, drawn from the peculiar position of the Ukraine, that was, like Belarus, a member of the UN even during the Soviet era. A rapid increase of the number of arbitration cases at arbitral centre at UCCI (from 28 in 1993 to 210 in 1996) was also reported, which could

The scarce information that comes from that region seems to indicate that attempts were made to avoid confrontations and leave time to solve the problem. Although the situation seems to show some signs of stabilizing, the problem still remained unsolved, so that the situation in the former Soviet Union is still to a great extent characterized *par une incertitude sur le sort des traités internationaux, une incertitude sur les clauses d'arbitrage, une incertitude sur l'exécution des sentences*.<sup>24</sup>

#### 4. Re-unification of two Germanies

The German case is an example from the very opposite end of the spectrum, both because it deals with the merger, and not with the dissolution of states, and because it (as opposed to the Soviet case) has induced the production of numerous publications and jurisprudence. The connecting factor in those cases is the structure of the approach and the level of uncertainty it produced.

In the former German Democratic Republic (hereinafter DDR), in the fashion of other socialist countries, the only institution of international arbitration was the Arbitration Court at the Foreign Trade Chamber in Berlin, established in 1954. On the eve of German unification, it was agreed that the Foreign Trade Chamber will cease to exist. The decision was made by the members of this Chamber on July 31, 1990. Simultaneously, the arbitrators and the other persons linked to the arbitral centre of the Chamber founded the Association for Promotion of Arbitration (*Vereinigung zur Förderung der Schiedsgerichtsbarkeit e.V.*) as a private, non-governmental institution -- and one of the last decisions made by the dying Chamber was to transfer all of its powers to perform arbitration services to the newly established association. Consequently, the Arbitration Court of the FTC DDR continued to function as the Arbitration Court Berlin (*Schiedsgericht Berlin*).<sup>25</sup>

The new arbitral centre announced that it will arbitrate in three types of disputes: in international disputes, disputes between former Eastern block countries under the Moscow Convention<sup>26</sup>, and in domestic disputes between German parties. *Schiedsgericht Berlin* did not seem to have insignificant prospects: in DDR

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indicate more problems with the overload than with the underload of cases, and, consequently, affect the rationale of jurisdiction in cases of the old USSR clauses.

<sup>24</sup> Hascher, *Une perspective sur les changements à l'est de l'Europe*, in INVESTING IN EASTERN EUROPEAN COUNTRIES - AND ARBITRATION 192 (ASA SPECIAL SERIES, NO. 5) (March 1995).

<sup>25</sup> See Sandroch, *Effects of German Unification on Arbitration*, 1 AMERICAN REVIEW OF INTERNATIONAL ARBITRATION 272 (1990); Roth, *Schiedsgerichtsbarkeit in Berlin*, 2 CROAT. ARB. YEARB. 59 (1995).

<sup>26</sup> The prevailing number of cases of the former Arbitration Court arose from such cases.

times, the Arbitration Court of the DDR FTC developed a broad practice and had quite an impressive record.<sup>27</sup>

The personnel of the new arbitral centre was almost unchanged.<sup>28</sup> Its representatives claimed the existence of continuity in resolving disputes where "Berlin arbitration" was referred to, although the Foreign Trade Chamber of the DDR no longer existed. In the words of its new/old president:

The change of sponsorship of the Schiedsgericht Berlin produced no adverse effect on the validity of any arbitration agreement entered into previously; and just as little effect after the shortening of the name of the arbitration court, on any decisions which have been taken under the former name. There is no other permanent court of arbitration in Berlin; no danger of confusion; the service given to the parties has not deteriorated; and also there has been no change in the atmosphere in which arbitration is conducted in Berlin. [...] [A]rbitrators have stressed the continuity of the work of the Schiedsgericht Berlin, never interrupted in the years 1989 and 1990; that 'users' do exist; that persons qualified to sit as arbitrators are readily available as before; and, moreover, that there is the necessary machinery for administering any arbitration.<sup>29</sup>

This opinion became soon contested, especially in (former) West-German circles, and an intense fight in legal writing and jurisprudence started.<sup>30</sup> Several different German courts passed divided decisions on the validity of the "old clauses" (under which name this discussion was known in German literature).

The district courts in Berlin and Itzehoe confirmed in the first instance the validity of the "old clauses", arguing that the changed circumstances are not less, but more convenient with regard to the quality of the arbitration services. On the other hand, appellate courts in Hamburg and Frankfurt/Main found that the arbitration clauses had ceased to be effective, because of the disappearance of the the sponsorship (framework) organization. The latter courts argued that the identity of the sponsor constituted an essential part of the contract.<sup>31</sup>

<sup>27</sup> According to the records of the Court, it had in total about 9500 cases (700 pertained to East-West Trade, 8800 between Comecon countries); in 1991, there were 240 new cases and 280 cases were pending. A lot of the cases (esp. East-East ones) involved, though, smaller amounts, but in the last years a trend towards fewer cases of greater value was recorded. See Strobach, *Arbitration in Berlin*, 8 ARBITRATION INTERNATIONAL 185 (1992).

<sup>28</sup> The Association for Promotion of Arbitration was founded by 34 former members of the Court, mostly lawyers and law professors. See Sandrock, *supra* note 25, at 272.

<sup>29</sup> Strobach, *supra* note 27, at 186-87.

<sup>30</sup> For a short but representative review, see Bajons, *Der Einfluß der geänderten Staatsverhältnisse auf völkerrechtliche Übereinkommen und private Schiedsvereinbarungen*, 1 CROAT. ARB. YEARB. 148-50 (1994). See also Habscheid & Habscheid, *The End of East-West Commercial Arbitration - Arbitration between the Former Two Germanies*, 9 ARBITRATION INTERNATIONAL 203 (1993) and Roth, *supra* note 25, at 61 (n. 6-7).

<sup>31</sup> See Bajons, *supra* note 30, at 150. Hamburg decision was reported in 2 AM. REV. OF INTL. ARB. 493 (1991) by Daniel Levin.

Finally, on January 20, 1994 the highest German court, the Federal Court of Justice in Karlsruhe affirmed the decision of the Hamburg and Frankfurt courts. Thus, the *dictum* of the Karlsruhe court:

a) When the parties to an arbitration agreement have, by selecting a specific organization to carry out the arbitration, already taken important preliminary decisions regarding the composition of the deciding body - so-called institutional arbitration (in this case: the Court of Arbitration attached to the Chamber for Foreign Trade of the former GDR) - thus conceding to that organization significant influence on the composition of the tribunal (e.g. compulsory list of lawyers, substitute arbitrators and the Chairman to be named by the President of the Court of Arbitration appointed by the organization), then according to § 1033, 1 of the German Code of Civil Procedure the liquidation of this institution results in the arbitration agreement becoming null and void.

b) The legal status granted by means of the arbitration agreement to the institution called upon to constitute the arbitral tribunal is not transferable to another organization without agreement of the contracting parties.<sup>32</sup>

This decision has made final the destiny of the *Schiedsgericht Berlin*. Under various pressures, this arbitral centre decided -- some two months before the publication of the FCJ decision -- to merge with the leading (West) German arbitral institution, the German Institution for Arbitration (DIS) seated in Bonn.<sup>33</sup>

Although it might mean the end in a pragmatic context, it was not the end of the story: the reasoning of the Karlsruhe court was fiercely attacked in several papers.<sup>34</sup> It might be argued that the decision, although worded in a formalistic manner, might be considered, along with the Hamburg decision, as an exercise of policy reasoning that, "would move the dispute resolution from an originally intended arbitration court into the halls of an ordinary court", and infer a "bias against arbitration upon the parties".<sup>35</sup>

### 5. Yugoslavia

The collapse of the Yugoslav federation presents the succession issue yet in another setting, which is again fairly different from the previous ones. The differences regard both the occurrence of state succession, which happened under unfortunate war circumstances, and the past and the present of institutional arbitration on that territory.

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<sup>32</sup> Decision of the FCJ, Ref. No. III ZR 143/92, translated by the DIS (on record with the author); excerpts published in 2 CROAT. ARBIT. YEARB. 62.

<sup>33</sup> Reported in the materials of the DIS *Latest developments in German arbitration* (unpublished, on record with author).

<sup>34</sup> See, e.g., Schlosser, *Internationale Handelsschiedsgerichtsbarkeit im Zeichen staatlicher Neuordnung in Mittele- und Osteuropa*, 1995 IPRAX 360; Roth, *supra* note 25.

<sup>35</sup> Daniel Levin, *Arbitral Succession in German Re-Unification: A Decision*, 2 AM. REV. OF INT'L. ARB. 500.

As distinguished from the Soviet-block countries of the Council for Mutual Economic Assistance (CMEA), Yugoslavia was not bound by any special ties with the Soviet Union or other socialist countries. After the split with Stalin in the 1950's, the Soviet pattern of organization was abandoned. After a short episode, the State Arbitration Court<sup>36</sup> was transformed into a system of commercial courts in 1954, almost 40 years earlier than in the other socialist countries.<sup>37</sup> In the field of "conventional" voluntary arbitration, there were also significant differences: unlike the other Eastern-block countries, since 1965 domestic arbitration was permitted, and arbitration services were offered by every one of the economic chambers of the six republics and two provinces. Some of those arbitral centres developed significant jurisprudence and skilled arbitrators.

A touch of the socialist "guardian" approach remained: international commercial arbitration was concentrated in Belgrade, and performed by the Foreign Trade Arbitration Court that operated under the auspices of the Yugoslav Chamber of Economy, an organization that reflected the federal structure of the state and consisted of representatives of all the constitutive parts of the SFRY. This arbitral centre offered a set of rules, and a panel of arbitrators that encompassed arbitrators from all parts of the former federal state.

After the turbulent fall of Yugoslavia, new independent states emerged on its territory: Slovenia, Croatia<sup>38</sup>, Bosnia-Herzegovina<sup>39</sup> and Macedonia. Serbia and Montenegro have continued to maintain a union, called the Federal Republic of Yugoslavia, for which it claims to be the principal successor of the former SFRY. Other new republics contested this, and claimed that every new republic has the same right to the SFRY heritage. At the time of this writing, the SFRY succession is still pending.

Throughout this period, apparently undisturbed by the war and other events, the Foreign Trade Arbitration Court in Belgrade continued to operate, and the Yugoslav Chamber of Economy continued to exist at the same address, although it underwent major organizational and personnel changes. In fact, the "Yugoslav" Chamber of Economy became an organization of the Federal Republic of

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<sup>36</sup> Established in December 1946, *see* OFF. GAZ. YUGOSLAVIA 103/46.

<sup>37</sup> *See* ZUGLIA, SUDOVI I OSTALI ORGANI GRAĐANSKOG PRAVOSUĐA 160 [COURTS AND OTHER ORGANS OF CIVIL JUSTICE] (Zagreb, 1956).

<sup>38</sup> Slovenia and Croatia declared their independence on June 25, 1991 (OFF. GAZ. SLOVENIA 1/91); Slovenia maintained that date as the date of its independence in spite of a three-month moratorium; in Croatia, the moratorium was obeyed, and therefore, under Croatian internal law, it became independent on October 8, 1991. The European Union recognized Croatia and Slovenia on January 15, 1992; they became members of the United Nations on May 22, 1992.

<sup>39</sup> Bosnia-Herzegovina decided to secede from Yugoslavia by referendum held on March 1, 1992, effective from March 6, 1992. On April 6, 1992, it was recognized by the European Union; it was accepted as a UN member on May 22, 1992.

Yugoslavia ("FRY" i.e., Serbia and Montenegro) which was in the other parts of former Yugoslavia either not recognized, or regarded as a (hostile) foreign state. The FTAC tried, however, to produce the appearance of continuity: e.g., for some time, it even continued to offer arbitrators from other republics on its Panel, and attempted to organize hearings with such arbitrators in pending cases, mostly without significant success. Because of the hostilities or open war, communication between FRY and the other parts were cut; arbitrators from other republics were not willing to continue contacts with Belgrade; and, above all, parties from such republics did not wish to have anything in common with an institution from Belgrade. In the course of the UN embargo against the FRY, the entities from Croatia, for example, which were even legally prohibited from having any type of relations with the Serbian and Montenegrin entities, agencies and institutions.<sup>40</sup>

In some places, courts had the opportunity to rule on the issue of the validity of the remaining FTAC clauses, which were fairly often used in all parts of former Yugoslavia. In Croatia, the Zagreb High Commercial Court decided in its judgement of April 29, 1992, that after the secession of Croatia such arbitration clauses do not have any more legal effect.<sup>41</sup>

The High Commercial Court relied on two main lines of argument in its decision: first, the Court concluded that the Yugoslav Chamber of Economy does not exist any longer in its previous form<sup>42</sup>, which implies the liquidation of its organs, such as the FTAC. Second, even if the FTAC would still exist, it would be a foreign arbitration institution. Under such changed circumstances, the foreign plaintiff would have never accepted the arbitration clause.

Similar views can be found in legal writing. Dr. Dika, for example, iterates the first line of the argument:

[S]ince FTAC was an institution at a federal association, by liquidation of the federation this association, established under federal law, ceased to exist. The same applies to the FTAC that was an adjunct organization of the association. Although this institution in an organisational sense continued to operate, although their facilities and personnel remained the same, although it maintained its name and pretended to be what it was before, from the

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<sup>40</sup> See e.g., governmental Decrees on implementation of the UN sanctions against FRY of June 2, 1992 and November 23, 1993; (some of) those restrictions were provisionally lifted on September 24, 1996.

<sup>41</sup> Judgement of the High Commercial Court in Zagreb No. P`-957/92, published in 2 CROAT. ARBIT. YEARB. 209 (1995).

<sup>42</sup> As a federal institution, it ceased to be an association of general branch associations when newly independent states were established. See 2 CROAT. ARBIT. YEARB. 210.

viewpoint of the Croatian legal order it lost that meaning - it became a legally nonexistent body.<sup>43</sup>

According to such an interpretation, every arbitral proceeding that was pending at FTAC would in Croatia lose every legal relevance on October 8, 1991. If an award would be rendered anyway, it should be treated as null and void.<sup>44</sup>

Some papers implicitly pursued the other line of Croatia's Commercial Court argument (those inspired by the hypothetical "even if FTAC would exist") and briefly addressed the other possible treatment of "nonexistent institution". According to such an approach, the FTAC would still have to be treated as a *new, different institution* - but, then we would have to ask what is the nationality of arbitral awards rendered under its auspices, and whether its enforcement would be contrary to Croatian public policy.<sup>45</sup>

A slightly more pragmatic approach was taken by Slovenian arbitration circles. Slovenia had a very brief experience of open hostilities with the FRY, so it was not difficult to accept the FTAC as legally existent entity, although there was no doubt that it had to be treated as a foreign arbitration institution.<sup>46</sup> In proceedings that were commenced before, and were pending after Slovenian independence, Slovenian theory argued that arbitration clauses were not *ipso facto* null and void.<sup>47</sup> However, it was argued that it would be possible to request annulment of such arbitration agreements, by applying the doctrine of *clausula rebus sic stantibus* (frustration of contract doctrine, *der Fall der Geschäftsgrundlage*). According to some data, such an approach enabled conclusion of some pending cases between Slovenian and third-country parties, formally sponsored by the FTAC, but arbitrated and administered solely by Slovenian and foreign arbitrators. However, Slovenian courts did not have a chance to express their opinion on this issue.

On the other hand, the issue of the post-Yugoslav arbitral succession occurred in third countries. One of these cases, a decision of April 2, 1994 by the District

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<sup>43</sup> Dika, *Arbitra`no rje{avanje sporova u odnosima s postjugoslavenskim elementom: neki aktualni problemi* [Arbitral Settlement of Disputes in Relations with a Post-Yugoslav Element], in 22-23 PRINOSI ZA IZU~AVANJE POREDBENOG I MEĐUNARODNOG PRAVA 1 (1992).

<sup>44</sup> Cf. *id.*

<sup>45</sup> See e.g. Sajko, *Aktueller Stand der internationalen Schiedsgerichtbarkeit in Kroatien*, Report at Vienna Seminar 1993, at 19; see also Bühler, *Die Bedeutung der Schiedsgerichtsbarkeit bei Investitionsprojekten in Mittel- und Osteuropa*, 12 BETRIEBSBERATER (BEILAGE 5) at 15 (1994).

<sup>46</sup> Cf. Wedam-Luki}, *Priznanje in izvr{itev arbitra`nih odlo~b izdanih v drugih republikah dosedanje SFRJ* [Recognition and Enforcement of Arbitral Awards Rendered in Other Republics of Former SFRJ], 4 PP at 8.

<sup>47</sup> See Ile{i~, *Arbitra`ni sporazum* [Arbitration Agreement] in DIKA-UZELAC-GIUNIO (EDS.), *MEDJUNARODNA TRGOVA~KA ARBITRA`A U HRVATSKOJ I SLOVENIJI* 74-75 (1993).

Court in Kassel, was already reported in this Yearbook.<sup>48</sup> The Kassel Court decided that an FTAC arbitration clause in a dispute between a Slovenian and third party country may exceptionally be cancelled, because it refers to the jurisdiction of an institution whose seat is in the territory of a hostile power. It can not be reasonably assumed, so the Kassel Court, that under such circumstances arbitration proceedings will be conducted in a fair manner.

In another case<sup>49</sup>, another German court decided that under different circumstances, a Belgrade FTAC arbitral award may be recognized. In this case, the award was favorable for a Croatian party that sought enforcement in Germany against a German party.

The trend of normalization of inter-state relations between countries-successors of former Yugoslavia after the Dayton agreement might again change the optic of the courts and scholars. In the course of 1996, agreements on friendly relations were concluded between the FRY and Slovenia, Bosnia-Herzegovina and Croatia, respectively. After those agreements, it is no longer doubtful whether FTAC exists or not. At the same time, it seems that the recognition of the FTAC arbitral awards in the other former Yugoslav republics would have to be governed by the New York Convention of 1958, since all of the new states that emerged from former Yugoslavia are parties to that convention by succession<sup>50</sup>, assuming that the continuity of the FRY membership to the NYC is asserted.<sup>51</sup>

### **Succession theory: are uniform criteria possible?**

It is obvious that a great deal of uncertainty, as Hascher noted,<sup>52</sup> still exists with regard to the succession discussion and “old clauses”, no matter what state is concerned. Courts differ in opinions and attempt to avoid the matter or postpone some issues; changes in the current political state of affairs lead to changes of opinions; personal interests of arbitrators and arbitration institutions affect their judgment.

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<sup>48</sup> 1 CROAT. ARBIT. YEARB 153-55; A brief commentary by Ena-Marlis Bajons is attached as well; see Bajons, *supra* note 30.

<sup>49</sup> District Court (OLG) Hamm, Judgement of July 6, 1994, 20 U 162/93, published in 1995 IPRAX 386; excerpts are published in the attachments to this issue of CROAT. ARBIT. YEARB.

<sup>50</sup> Slovenia became party to the NYC by succession on its independence day, on June 25, 1991; Croatia notified succession on July 23, 1996 (retroactively from October 8, 1991); Bosnia-Herzegovina also became party retroactively from March 6, 1992; Macedonia notified its succession on March 10, 1994. Former Yugoslavia was member to NYC from February 26, 1982, subject to three reservations (application to the awards made in the territory of another contracting state; application to commercial relations; application to the awards rendered after the Convention came into effect). For the time being, all of the reservations apply to successors of Yugoslavia as well.

<sup>51</sup> Cf. Sajko, Report at Vienna Seminar 1996, at 21 (on record with Vienna Arbitral Centre).

<sup>52</sup> *Supra* note 24.



It seems that the globally prevailing tactic is one of waiting and delaying: if the problem cannot be solved, it could disappear by the lapse of time. This is, however, not entirely true. Naturally, the number of "old clauses" in circulation might reduce, but problems might appear unexpectedly: some of the contracts in which they were included might lead to disputes tens of years after their conclusion. Also, even if precedents in one jurisdiction stabilize jurisprudence, problems may arise in another one. An "old clause" might become an issue in virtually any state of the world, because those who want to prevent recognition and enforcement might raise the (alleged) invalidity of the arbitration clause wherever enforcement is sought. The same problem might also arise (as in the Kassel case), if a party would bring a case to court, and the other party would object to jurisdiction because arbitration was agreed upon.

This is not the only aspect that could be extracted from "old clauses" and "new institutions" debates. Even if we treat them as an accidental and transitory feature (actually, states do not fall apart or merge every day), it seems that this series of cases offers a splendid opportunity for analysis of the global approach to institutional arbitration and their understanding in comparative law. That could open a broader discussion and discover arguments potentially useful in some future cases.

Could uniform criteria for evaluation of succession cases be elaborated? The answer clearly depends on an understanding of the role and function of the arbitral institutions. In fact, approaches taken by the courts and legal writing contain a number of various arguments, but they may ultimately be reduced to their sources: the two types of approaches to arbitration that were defined as "cradle theory" and "guardian theory".<sup>53</sup>

One approach, e.g., tries to address the issue by favoring the analogy of regular court - arbitration institution. As Habscheid & Habscheid note:

The striking feature is [...] that private arbitration is partly treated as a state domain, so that if the state is dissolved, the jurisdiction of all arbitration tribunals having their base therein is dissolved too -- but also partly treated as an accessory of an arbitral organisation of a public or private nature -- so that 'if the institutional organisation of the arbitral tribunal in question is dissolved, the arbitration clauses become redundant'.<sup>54</sup>

Under such an approach, directly impacted by the "guardian theory", it is not the arbitrators, but the arbitration institution that decides in the dispute. Following the logic of this approach, the decisive factor is the authority to rule that was given to the institution and its arbitrators principally by the state, and only

<sup>53</sup> See *supra* at 72.

<sup>54</sup> Habscheid & Habscheid, *supra* note 30 at 208.

incidentally by the parties. Consequently, if a state is transformed, it is necessary to change the “mandate” and “jurisdiction” of the institution, either explicitly (e.g., by enacting a law, as in the Czech<sup>55</sup> example) or implicitly (e.g., by searching for the “successor” of the sponsorship organisation, as in several quoted cases).

The advantage of this approach is the greater predictability and certainty of its formalism although not even a formalist view finds unique solutions for all questions. Its greatest disadvantage is its lack of respect for the parties’ will, and certain counter-factual assumptions that the institution, and not the arbitrators decide cases.<sup>56</sup> As already noted, this approach would frequently prove to be anti-arbitration, and parties would often end up where they did not want to be in the first place -- in regular courts. Generally, this approach does not correspond to a modern understanding of arbitration.

The other approach would be one that starts from the assumption of “cradle theory”: arbitration is a private mechanism, parties are its principal masters, and their will has to be the governing factor in construction of the arbitral clause. The institution does matter, but as a facilitator that provides favorable background to arbitration, and guarantees the quality and speed of the process, not as its master and administrative ruler. This would be a favored approach, but it raises another question: what do we agree upon when we agree on institutional arbitration?

It suffices no more that a superficial look at arbitral theory and self-understanding of arbitration institutions to discover a variety of things that parties might have in mind. So, why would parties agree to choose an (institutional) arbitration? Here are some of the possible motives:

1. specific set of arbitration rules;
2. the persons of arbitrators and/or secretarial staff of the institution;
3. the quality of administrative assistance;
4. reputation of the institution;
5. the enforceability of the award in the country/countries where enforcement would take place;
6. speed of the proceedings;
7. other factors, such as the attractiveness of the place of arbitration, positive and conciliatory atmosphere, cooperation agreements and other institutional ties of the institution with other organisations and agencies etc.

<sup>55</sup> See *supra* at 77.

<sup>56</sup> E.g., German decisions that declared “old clauses” invalid relied on analogy from § 1033/1 of the German Code of Civil Procedure and equates transformation of the (sponsorship) institution with the death of the arbitrator (if a reference to their persons is made in the arbitration agreement). See Habscheid & Habscheid, *supra* note 30 at 209.

If one or more factors from the above list would change, it could be legitimately asked whether the parties would have agreed to (such) arbitration. Under such an approach, a decisive criterion would be whether certain circumstances that were (or were supposed to be) in contemplation of the parties at the time of the conclusion of the contract, and are no longer in existence, were necessary for performance. Performance is defined, thereby, not only by the composing of an arbitral tribunal in the way provided by the contract<sup>57</sup>, but also by its functioning, and its product, the arbitral award. Under such an approach, no arbitration agreements would be automatically regarded as null and void in succession cases.<sup>58</sup> Upon objection of a party, either in a separate proceeding, or incidentally, a thorough examination of all circumstances, and their impact on the initiation of the arbitration proceedings, its duration, impartiality and quality, as well as enforceability of the award would be needed.<sup>59</sup>

The method offered by the second approach might be harder, but it is correct. It corresponds to the private nature of the arbitral settlement of disputes, and upholds the parties' desire to use the advantages of international commercial arbitration in the first place. The advantages or disadvantages in succession cases, as compared to other alternatives (usually regular court procedure), provide fertile theoretical ground for courts and analysts. To deny that would mean to overlook the nature of arbitration and to adversely affect it.

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<sup>57</sup> As might be deduced from the commentary to § 1033 n. 1 ZPO by Stein/Jonas/Schlosser; *see id.* at 213.

<sup>58</sup> *Cf. e.g.*, approach of Germany's District Court in Hamm (*supra* note 29) that stated that a private agreement such as arbitral clause will not be affected by state transformations.

<sup>59</sup> This approach is, seemingly, taken by the Kassel Court in Belgrade FTAC case, and by those who advocate the application of *clausula rebus sic stantibus* in succession cases.