PPJ 2016

PUBLIC AND PRIVATE JUSTICE 2016

Arbitration and Court Litigation: Cross-Fertilization or Complementarity

COURSE MATERIALS

Dubrovnik, 23 – 27 May, 2016

IUC Inter University Centre Dubrovnik

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This conference is co-sponsored by the Croatian Science Foundation

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11th Annual PPJ Course and Conference, IUC Dubrovnik

ARBITRATION AND COURT LITIGATION: CROSS-FERTILIZATION OR COMPLEMENTARITY 23-27 May 2016

Conference outline

The Public and Private Justice Course and Conference has since its inception focused on the relationship between public and private dispute resolution methods. This year, we are concentrating on the interplay between arbitration and litigation. Unlike most customary approaches, in PPJ 2016 we have no wish to explore (only) the way in which public and private justice collaborate in concrete cases (i.e. how arbitration replaces court jurisdiction, or how courts assist in the recognition and enforcement of arbitral awards). What we wish to discuss is whether practices and routines developed in an autonomously designed and agreed dispute resolution procedure like arbitration may have a positive impact on changes in litigation practices, and whether such practices already inspire changes in the public culture of dispute resolution. On the other hand, we also wish to study whether such rapprochement of public and private justice has its limits, and whether it can trigger concerns.

The flexibility of the arbitration proceedings offers an ideal laboratory for the continuing efforts to adjust procedural techniques to the requirements of each dispute, but also to modern life and the parties' expectations. Adding an international element, which is often present in arbitrated disputes, enables further adjustments in pursuit of procedural rules that offer an acceptable compromise for participants from different legal backgrounds and traditions. Can an evolving de facto harmonization of some elements of proceedings in international arbitration serve as guidance for reforms of procedural rules in national (and international) litigations?

A major goal of contemporary civil justice systems is to provide useful, user-friendly services to their users. This is a challenge both to public and to private justice. However, in the context of arbitration, which is driven by market forces, highly customizable and guided by ideas of party autonomy, the adjustments to the needs of the parties can happen faster and may produce deeper changes. On the other side, litigation practices usually evolve slowly, burdened by the difficulties of dealing with a massive and complex apparatus and the vested interests of many of those who take part in its functioning. In civil litigation, there are also other, legitimate concerns different from the concerns of arbitration proceedings. Uniformity in dealing with repetitive cases and legal issues, publicity of proceedings and the desire to safeguard the protection of public interests are the postulates which are inherent to public dispute resolution methods. These and other specifics of civil litigation may set ultimate limits to imports and borrowings from arbitral experience. Still, a space for the transformation of civil justice under the influence of successful experiences from the arbitral world may be significant. Some international rules and practices developed in the context of arbitration may be a factor, and a source of orientation, in attempts to harmonize regional, European or global rules and practices of civil procedure.

The speakers at the PPJ 2016 Conference are invited to reflect on the situation regarding this relationship between arbitration and court litigation in their countries, and/or at the regional and global level. Cross-fertilization and the relationship of the complementarity (or opposition) of litigation and arbitration can be studied regarding all stages, types and aspects of the dispute resolution process. Some of the possible areas of study are: development of effective case-management practices; evolution of communication methods and methods of serving documents; party autonomy in arbitration and litigation proceedings –

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more choice for parties in court proceedings, less in arbitration?; taking of evidence – production of documents, use of experts and presentation of witness testimony; quality control systems – legal remedies and means of recourse; hybrid practices – state- investor arbitrations; powers of courts and arbitrators to issue provisional measures; and any other relevant topic.

The draft programme of PPJ 2016 will be published at http://alanuzelac.from.hr/text/iuc-course. We warmly welcome you to join us for a discussion of the above matters.

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Arbitration and Court Litigation:
Cross-Fertilization or Complementarity?

Programme 2016 * Eleventh PPJ Course and Conference

Monday, May 23 **Registration** (9,00 - 9,30)	Opening speeches
Morning Session: (9,30 – 13,00)	Rob Jagtenberg and Annie de Roo (Rotterdam): Arbitrarily Barred from the Courts? The Motives and Efficiency Considerations Behind Mandatory Employment Arbitration
[Coffee break 11,00-11,30]	Wendy Kennet (Cardiff), Arbitration/Litigation Hybrids in the Field of Family Law
	Marko Bratković (Zagreb), Who Bears the Costs of Partial Victory in Arbitration and Litigation Proceedings
Lunch Break (13,00 – 15,00)	
Afternoon Session: (15,00 – 18,00)	Ivan Milotić (Zagreb), Mutual Relationship and Cross-fertilization of Arbitration and Litigation in Roman Law
	Tomislav Karlović (Zagreb), *Editio actionis et instrumentorum* and the Limits on the Introduction of New Facts and Evidence in Roman Law
Tuesday, May 24	Aleš Galič (Ljubljana), Awards on Agreed Terms - a Likely Cause of Disagreements?
Morning Session: (9,30 – 13,00)	Alan Uzelac (Zagreb), The Worst of Both Worlds? How the EU Conceives „Arbitration" before an „International Court"
[Coffee break 11,00-11,30]	Zvonimir Jelinić (Osijek), Liabilities of Judges and Arbitrators Compared
	Carolina Stefanetti (Milan), *Translatio iudicii* between Arbitration and State Courts in Italy: a Critical Perspective
Lunch Break (13,00 – 15,00)	
Afternoon Session (15,00-18,00)	Nancy Schultz (Orange, CA), Is Arbitration Unfair To Consumers?
	Linda Gruijthuijsen and Laurie Schreurs (Maastricht), Civil Procedure and Arbitration: What Practice Thinks of Benefiting from Practice
Wednesday, May 25	Torbjörn Andersson (Uppsala), Power, Corruption and Autonomy - a Recent Swedish Example of a Public-Private Collision in the Section of Arbitration and Competition Law
Morning session (9,00 – 12,00)	Bartosz Karolczyk (Waszaw), Arbitration and Court Litigation in Poland: The Story of Two Separate Worlds
	Tatjana Zoroska Kamilovska (Skopje), Rapprochement of Arbitration and Court Proceedings in Issuing Provisional Measures – Possibilities and Limits
Afternoon (12,00 – 23,30) **Study Trip**	Boat trip to Island Šipan – visit to Suđurađ and Šipanska Luka (lunch and dinner included)
Thursday, May 26	Magne Strandberg (Bergen), Arbitration as a Matter of Inspiration for Regular Courts in Norway
Morning Session (9,30-13,00)	Christian Koller (Vienna), Standard of Proof in International Arbitration. An Uncharted Territory for Cross Fertilization?
	Jorg Sladič (Maribor), Professional Secrecy, Legal Professional Privilege: Same or Different Contents in Arbitration and Civil Litigation?
Lunch Break (13,00 – 15,00)	
Afternoon Session: (15,00-18,00)	Juraj Brozović (Zagreb), On Increasing „Judicialization" of Arbitral Rules in Croatia: Evolution of Zagreb Rules in the 1992-2016 Period
	Thino Bekker (Pretoria), The Interrelationship Between Arbitration and Civil Litigation in the South African Legal System

Friday, May 27	*PUBLIC AND PRIVATE JUSTICE – NEW DEVELOPMENTS*
Panel on Civil Justice (9,30 – 11,00)	*Transformation of European Law on Civil Procedure – On the Progress of the ELI-UNIDROIT work – Obligations of Parties, Lawyers and Judges* Remco van Rhee, Alan Uzelac, Elisabetta Silvestri, Magne Strandberg, Walter Rechberger, Emmanuel Jeuland, Bartosz Karolczyk
Panel on Legal Clinics (9,00 – 12,00)	*Challenges in Clinical Legal Education- Sustainability of Clinical Programs* 1st panel session: *LEGAL CLINICS IN EUROPE: WHAT DO WE KNOW SO FAR AND WHERE DO WE GO FROM HERE?* Sarah Morse (Northumbria), Models of Sustainable Clinic Dubravka Akšamović (Osijek), Developing Common European Standards (Framework) for Clinical Programs Boris Vuković (Osijek), Working Together on *Pro bono* Projects - Perspective from Commercial Court Judge Ratko Brnabić (Split), Optimal Organizational Form for Providing Free Legal Aid Services: Associations or Clinics for Legal Aid? Lidija Šimunović (Osijek), Clinical Legal Education - an Interdisciplinary Approach Toni Pranić (Osijek), Sociological Perspective on Establishing Legal Clinic
[Coffee break 10,30]	2nd panel session: *CLINICAL LEGAL EDUCATION IN AN ERA OF LIMITED (FINANCIAL) RESOURCES. IS FINANCIAL SUSTAINABILITY ONE OF THE MOST COMMON PROBLEM OF CLINICAL PROGRAMS?* Catherine Evans (London), Sustainability and the Challenge in Mainstreaming Legal Education as Part of the Law Curriculum Toni Deskoski & Vangel Dokovski (Skopje), Reconsidering Clinical Legal Education in Macedonia - Lessons from the Past Lidija Zajec (Zagreb), The Role of Legal Clinics in the Free Legal Aid System Zvonimir Jelinić (Osijek), Money – Does It Matter, and If So Why, If We Want to Sustain Our „Live Client" Clinical Programmes for the Long Run? Barbara Preložnjak & Juraj Brozović (Zagreb), The Financial Challenges of Clinical Legal Education in Legal Aid Reform. Example from Zagreb Law Clinic
Lunch break (12,00 – 14,00)	
Afternoon Session (14,00 – 17,00)	3rd panel session: *EXCHANGE OF CLINICAL EXPERIENCE AMONG STUDENTS - IMPACT OF CLINIC SUSTAINABILITY ON PRACTICAL LEGAL EDUCATION* Jason Tucker (Cardiff), Curricular or Extracurricular – What Model of Clinical Legal Provision Best Meets Students' Needs and How Can It Be Achieved? Vlatka Cikač (Zagreb),The Encounter of Theory and Praxis *Students-clinicians*: London South Bank University, Ss. Cyril and Methodius University in Skopje, Universities of Bergen, Oslo, Zagreb, Osijek and Split

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COURSE MATERIALS

ROB JAGTENBERG & ANNIE DE ROO

The Motives and Efficiency Considerations Behind Mandatory Employment Arbitration

WENDY KENNETT

Arbitration/Litigation Hybrids in the Field of Family Law

MARKO BRATKOVIĆ

Who Bears the Costs of Partial Victory in Arbitration and Litigation Proceedings?

IVAN MILOTIĆ

Mutual Relationship and Cross-Fertilization of Arbitration and Litigation in Roman Law

TOMISLAV KARLOVIĆ

Editio actionis et instrumentorum and the Limits on the Introduction of New Facts and Evidence in Roman Law

ALEŠ GALIČ

Award on Agreed Terms – A Likely Cause of Disagreements

ALAN UZELAC

The Worst of Both Worlds? How the EU Conceives „Arbitration" before an „International Court"

ZVONIMIR JELINIĆ

Liability of Judges and Arbitrators Compared

CAROLINA STEFANETTI

Translatio iudicii between Arbitration and State Courts in Italy: a Critical Perspective

Arbitrarily Barred from the Courts?

The Motives and Efficiency Considerations Behind Mandatory Employment Arbitration

ROB JAGTENBERG & ANNIE DE ROO

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The focus of this paper is on employment disputes, a domain where dispute resolution out-of-court has a long tradition. However, among the methods used here, arbitration has always been less prominent than negotiation-based approaches, except in some specific areas and/or during some particular periods.

One of the questions to be addressed, is: whether there is a rationale underlying the pattern of (mandatory) employment arbitration, and the overall preference for mediation. To this end, both the regulatory framework and the practice of arbitration (and mediation) will be discussed, with reference to the EU and the USA. Various European Industrial Relations Observatory (EIRO) surveys and empirical work undertaken at Cornell University (US) will be referred to. As will be shown, a key issue turns out to be the alleged efficiency of mandatory employment arbitration. The very notion of efficiency may be problematic in itself, however, as will be illustrated through some novel methods of analysis (like Social Return on Investment), that will be applied to some topical current issues.

As arbitration, mediation and litigation are compared throughout this paper, the presentation will be preceded by a conceptual inquiry into such notions as 'genuine' versus 'quasi' arbitration, 'neutral evaluation', 'med-arb', and mediation.

Arbitration/Litigation Hybrids in the Field of Family Law

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The objective of this paper is to highlight the two-way process of cross-fertilization between arbitration and litigation - and link it to last year's seminar theme: the outsourcing of judicial tasks.

While the process of litigation may become more flexible through adopting ideas from arbitration practice, arbitration has also adapted itself to new types of disputes – incorporating elements that are required if the resulting award is to be recognised within the judicial system – so that those new types of disputes can be 'outsourced' to arbitration (or to some new hybrid that does not fit comfortably within traditional definitions of arbitration or litigation)

This process can be seen occurring in the context of family law. In many jurisdictions there is a strong incentive to 'outsource' family dispute resolution. As divorce and the disputes concerning financial and child arrangements flowing therefrom have become more common, pressures have mounted on the judicial system. A number of ways of reducing this pressure have been implemented, including greater emphasis on mediation – often being required before litigation is permitted; the dejudicialisation of consensual divorce to notaries, administrators or court registrars; and an acceptance of arbitration as a method of dispute resolution in family matters. The latter development – gathering momentum in common law jurisdictions, but rare in civil law ones - has involved overcoming traditional interpretations of the law excluding extra-judicial resolution of matrimonial disputes on grounds of public policy. One strand of argument emphasises the importance increasingly attributed to personal autonomy in family matters. However, a second strand suggests ways of regulating family arbitration to take justified public policy considerations into account.

Factors that have been identified as requiring modifications to the general law of arbitration include:

i) The lack of dispute-resolution experience of the parties;

ii) A possible imbalance of power – and in particular concerns about domestic violence;

iii) The status of any children of the marriage in arbitration;

iv) The fact that the relationship may be a long one, and that the vicissitudes of life may have caused considerable shifts in the power balance and expectations of the parties;

v) The public interest in satisfactory resolution of matrimonial disputes and more especially in the arrangements made for the care and financial support of any children of the marriage.

While in some states, e.g. the UK, these concerns have been taken into account preventatively by arbitration professionals working in the field of family law, in others mandatory rules have been established.

Particularly problematic is the authority to be accorded to an arbitral award in family matters. Whereas in the context of commercial arbitration, the preference for rapid resolution of the dispute justifies limited procedural grounds for setting aside an award, in the family law context there is a need to ensure that mandatory rules are observed. Various solutions to this problem can be found in different jurisdictions (including the limiting of arbitration to financial disputes and the exclusion of child arrangements). Nevertheless, since the parties agreed to arbitration in the first place, the disputes at issue are unlikely to include more acrimonious divorces, and so parties may well accept the arbitration award in order to gain closure, rather than pursue their dispute to a further 'instance'.

Who Bears the Costs of Partial Victory in Arbitration and Litigation Proceedings?

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If a party succeeds in the proceedings in part, the court may, having regard to the success achieved, order that each party must bear their respective costs, or that one party must reimburse to the other party and the intervener the corresponding part of the costs. (Article 154(2) of the Croatian Civil Procedure Act)

According to the cited paragraph of the Croatian Civil Procedure Act, when a party partly succeeds in the proceedings, the court may order that party to reimburse the corresponding part of the other party's costs. It means that where the plaintiff succeeds in a civil action only in part, he may have to pay the defendant's costs (including lawyers' fees) in proportion to the percentage of his claim that was disallowed. The purpose of such a rule is to protect defendants from frivolous lawsuits which unreasonably increase the costs professional legal representation for the defendant.

However, application of this rule seems to be problematic. In recent decades inconsistent case law has developed resulting in tremendous differences in awarded costs of partial victory in similar cases. Even the Supreme Court has issued different legal interpretations in that regard. The European Court of Human Rights warned in one of its decisions (*Klauz v. Croatia*) that courts should not apply the cited provision mechanically without having sufficient regard to the specific circumstances of each case. What are the specific circumstances of the case that a court has to take into account in awarding costs? And to which extent should these be considered?

Obviously, strict mathematical considerations on the proportionality between the level of success in the proceeding and the costs incurred do not suffice. The question arises how to properly balance the mathematical efficiency and fairness of the result in awarding costs of partial victory. What are the comparative experiences in that regard? Who bears the costs of partial victory in comparative litigation proceedings? Experiences from international arbitration in which participants come from different legal backgrounds and traditions should be even more beneficial in finding the ideal model approach to the allocation of costs in case of partial win/loss in civil litigation (and arbitration) proceedings.

Mutual Relationship and Cross-Fertilization of Arbitration and Litigation in Roman Law

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The ultimate goal of litigation and arbitration in Roman law was analogue because they should both result with a final and binding dispute resolution. This is elegantly expressed by the Justinian's lawyers who interpolated the classical sources of Roman law by saying *Compromissum ad similitudinem iudiciorum redigitur et ad finiendas lites pertinet* (Paul., D.4.8.1.). Substantial distinctions appear when question is raised on how the dispute resolution is achieved by each of this means. Both of this proceeding were modelled on the same basic principles and retained similar structures. However, the major and most recognizable diversities usually emerged as a reaction to something that was considered as disadvantage of litigation in relation to arbitration. That is the reason why relations between litigation and arbitration should not be exclusively analyzed from perspective of their similarities and analogies (some of which were undoubtedly results of cross-fertilization), but also from the point of view of dissimilarities which were result of their coexistence and emerged as a means of procedural improvements and changes. Therefore, this paper will analyze both aspects of this process which is manifested as complementarity and opposition in relation between litigation and arbitration in Roman law.

***Editio actionis et instrumentorum* and the Limits on the Introduction of New Facts and Evidence in Roman Law**

TOMISLAV KARLOVIĆ

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The problem of the introduction of new facts and new evidence during the proceedings takes an important place in the discussions concerning the improvement of efficiency of contemporary civil procedure. While the legislator tends to curtail the possibility of submission of new evidence past the preliminary hearing in an effort to limit the possibility for parties to (maliciously) prolong the proceedings, it seems that there always remain some loopholes provided to guarantee the reaching of just and truthful result which are in turn exploited for undesired purposes. In the search for solutions, as in the other areas of civil procedure, legal scholars are turning their eyes towards the arbitration proceedings and the different arbitration rules. In this paper we shall look to the past, to the experience of Roman law. It will be examined the role and the effects of *editio actionis et instrumentorum*, the preparation and the information of other party of the *actio* the claimant intends to bring and the evidence he will submit in the proceedings *apud iudicem*. Among other unresolved

issues concerning *editio*, e.g. the relationship of extrajudicial and judicial *editio*, special attention will be given to the question of effects of *editio instrumentorum* in the second phase of the procedure before the judge and the problem of preclusion of the introduction of new evidence.

Award on Agreed Terms – A Likely Cause of Disagreements

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If a settlement is reached in course of arbitration, it is well known that there are two options. For example the Slovenian Arbitration Act provides (Art. 34):

> »*If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings. If requested by the parties, the settlement shall be recorded in the form of an arbitral award on agreed terms, except if the content of the settlement is in conflict with the public policy of the Republic of Slovenia.*
>
> *An award on agreed terms shall ….state that it is an award. Such an award has the same effect as any other award on the merits of the case*. «

In a similar manner Art. 30 UNCITRAL MODEL LAW provides:

> »*… and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement*…«

Hence the default position is that a settlement reached in arbitration has a force of a contract. It is thus binding but not directly enforceable. The parties can however achieve that the consensual settlement of their dispute will have a quality of an enforceable title. Rules of arbitral institutions follow this pattern, for example the 2014 Ljubljana Rules (Art. 43).

Different questions are put in this regard. To start with, are arbitrators bound by the parties' proposal to issue an award on agreed terms? Seemingly minor differences in the wording of the above texts are not necessarily irrelevant. On the one hand the Slovenian Arbitration Act seems to leave no discretion to the tribunal, if the settlement contravenes public policy it may not issue an award on agreed terms, whereas if the settlement does not violate public policy the tribunal must accept the parties' proposal to issue an award on agreed terms. On the other hand, the UNCITRAL Model Law, probably more adequately leaves more discretion to the tribunal and acknowledges that violation of public policy might not be the only reason to refuse the parties proposal. But in general it is accepted that most important grounds for refusal do consist in breach of public policy as a result of illegality; e.g. corruption, money laundering, tax evasion, funding illegal activities, detriment for the non-parties…

The next question is the standard of proof for establishing illegality as a grounds for refusal ; is a mere suspicion sufficient or should the tribunal consider it probably (or even proven beyond a higher standard of proof) that there is indeed an illegal activity involved. Furthermore a question is put as to the effects of refusal: are proceedings terminated and a settlement agreement remains in force a contract (whereby the question whether this contract is valid or null and void is not an issue for this arbitration)? The other option is that if the tribunal refuses the parties' proposal the proceedings on merits are pending again (or at least the question is put whether the parties can enter a conditional settlement, that it will only be valid if the tribunal accepts to issue an award on agreed terms.

The next question is whether arbitrators can assist parties in reaching a settlement and if yes, only if requested by the parties, on their own initiative but with express consent (e.g. included in ToR, signed by the parties or in the PO1, not objected on that point) or even without an express consent of the parties. In this regard it should be taken into account that arbitrators, parties and counsel come from different legal traditions and that the possible active attempts of adjudicators – be judges or arbitrators –to help parties to settle their dispute may be considered welcome and is practiced on a day-to-day basis in some jurisdictions whereas in certain other jurisdictions the same activity may be considered as a infringement of requirements concerning independence and impartiality.

A reference can thus be made to IBA Guidelines on Conflicts of Interest in International Arbitration which provides (Art. 4.d):

»*An arbitrator may assist the parties in reaching a settlement*

….. However, before doing so, the arbitrator should receive an express agreement ….

Such express agreement shall be considered to be an effective waiver of any potential conflict of interest …. If the assistance by the arbitrator does not lead to final settlement of the case, the parties remain bound by their waiver.

However, ….., the arbitrator shall resign if, as a consequence of his or her involvement in the settlement process, the arbitrator develops doubts as to his or her ability to remain impartial or independent …. «

Probably the most burning issue concerns enforceability of awards on agreed terms. On the face of it seems that this should not result in any controversy. After all, the main difference between a contract and an award (on agreed terms) is precisely that the latter is enforceable. This is the very key purpose of the instrument of an award on agreed terms. In principle and if settlement agreement is genuinely reached in the course of arbitration there indeed should not be any controversy in this regard. The controversial issue however relates to the following: Does it matter whether there was still a genuine dispute in the moment when the matter was submitted to arbitration? Can an arbitral award on agreed

terms be rendered based on settlement agreement reached (e.g. in mediation) even before the request for arbitration was filed? It is well known that an unsuccessful mediation can turn into arbitration (e.g. the instrument of MED-ARB or, in general, multi-tiered (escalation) dispute settlement clauses). This however presupposes that mediation was unsuccessful. It is an entirely different question however if a *successful* mediation can turn into arbitration (for the purpose of achieving an enforceable title – an award on agreed terms).

In certain jurisdiction the answer to this question is clearly positive. For example, in Slovenia it is explicitly confirmed in legislation. The Mediation Act (Slovenia) provides (Art. 14/2):

> »*The parties may agree that the settlement agreement is recorded in the form of enforceable notarial deed, as a settlement in court or as an arbitral award on agreed terms.* «

The same approach is adopted by certain leading arbitral institutions which offer mediation; compare e.g. Art. 14 of the SCC Mediation Rules (2014):

> »*In case of settlement, the parties may, subject to the consent of the Mediator, agree to appoint the Mediator as an Arbitrator and request him/her to confirm the settlement agreement in an arbitral award.* «

The issue is nevertheless controversial and in the cross border context enforceability of such awards on agreed terms is far from certain. The crux of the matter lies in Art. 1 of the New York Convention which provides:

> »*This Convention shall apply to the recognition and enforcement of arbitral awards [.....] and arising out of differences between persons …*«

It is argued that in order for the New York Convention to apply an award, which enforcement is attempted should arise out of differences. Hence, there should be a genuine dispute between the parties in time when arbitration proceedings started. If arbitration is commenced with a sole purpose of confirming a settlement agreement already reached elsewhere before, recognition and enforcement of award on agreed terms should, pursuant to this view, be denied. It is indeed an inherent part of the arbitration agreement to submit to arbitration a dispute – not an agreement. For example, the UNCITRAL Model law provides (Art. 7):

> »*Arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes …«*

In this regard the UNCITRAL current work concerning enforceability of settlement agreements resulting from international commercial mediation should be briefly mentioned. Moreover, certain issues as to the merits of settlement agreements and awards on agreed terms should be discussed as

well, for example whether conditional settlements (*remains in force unless*…., *enters into force IF*….) are possible, what, if any, is a legal effect of clauses establishing procedural obligations ("*Prozessvertrag*") relating to other pending proceedings (e.g. »accepts to withdraw a claim, pending in … court (or another arbitration), the question whether issues not covered by the arbitration agreement can be determined and whether third parties, not bound by the arbitration agreement, can join etc. The legal effect of "no admittance of liability« clauses will be discussed. Last but not least, the issue of administrative costs and arbitrator's fees and allocation of costs shall be considered as well.

The Worst of Both Worlds?

How the EU Conceives „Arbitration" before an „International Court"

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The European Union has revealed its newly found hostility towards arbitration in the context of its largest – and so far the most controversial – project of international trade partnership treaty with the US, known as the TTIP (Transatlantic Trade and Investment Partnership). One stepping stone in TTIP negotiations, which started in July 2013, is the ISDS (investor-state dispute settlement system). While the US strongly support the protection of investors through their right to resort to arbitration, many European politicians have moved against inclusion of ISDS from the treaty. The European Parliament voiced support only for state-to-state dispute settlement system and opposed any bypassing of national courts. It is argued that ISDS has a chilling effect on regulation and a potential to whittle away standards across a range of policies from the environment to food safety to social protection. Due to public criticisms, the European Commission took the ISDS off the negotiating table in early 2014. After massive public consultations, marked by vocal opposition of the trade unions, consumer groups and environmentalists, it was clear that many saw in ISDS a way for the multinational companies to undermine national law and environmental standards, rather than a tool to protect the investors. In turn, the European Commission published in September 2015 its concept paper on ISDS "Investment in TTIP and beyond – the path for reform", which indicated already in its title that its ambition is to move away from the concept of "current ad hoc arbitration" and move towards an "Investment Court". As basic arguments for such an approach, the Concept Paper noted the "right to regulate", and the need to have ISDS options which "do not affect the ability of the EU and its MS to pursue public policy objectives". It is further argued that this public policy focus led to concrete DR principles, such as prohibition of forum shopping, prohibition of parallel proceedings, full and mandatory transparency of

the arbitration process, code of conduct for arbitrators with high ethical and professional standards and uniform cost rules. Further on, in November 2015, the European Union submitted its proposal of the relevant parts of the TTIP text, which included a section on resolution of investment disputes by an "Investment Court". However, the proposed regime for settlement of investment disputes bears many hybrid elements, combining features of (inter)national litigation with the features peculiar to (international) arbitration. In this presentation, it will be demonstrated that the proposed mix of features of arbitration and litigation results in a highly unstable and odd mechanism, which is hardly likely to ever become fair and effective. It is, in a word, "the worst of both worlds". Fortunately, the negotiations on the ISDS are continuing…

Liability of Judges and Arbitrators Compared

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Both judges and arbitrators serve the same function and goal – they both exercise a judicial function and provide dispute resolution service to parties - albeit in very different legal environments and contexts. Although their responsibilities in the process of case assessment have the same or nearly the same characteristics, such as to respect due process of law and to timely issue a decision, it is obvious that their liabilities differ a lot within different legal systems. For example, while laws of some countries impose criminal liability on biased arbitrators, or even those arbitrators who infract the rules concerning confidentiality of proceedings, in other countries arbitrators are not subject to criminal liability, since provisions of criminal codes do not recognize arbitrators as official persons (civil servants) capable of being criminally liable for this type of misconduct. Speaking about other forms of liability, such as civil or disciplinary liability, it is also evident that there is no uniform approach to these types of liability around the world. Nevertheless, certain overriding principles in relation to liability arbitrators and judges on a comparative level may be identified, compared and discussed. At the end the presenter will emphasize the legal environment and rules for arbitrators' and judges' liability in the Croatian legislature and the related case law.

Translatio iudicii between Arbitration and State Courts in Italy: a Critical Perspective

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The relations and conflicts of jurisdiction between arbitral tribunals and state courts has been one of the most debated issues as far as arbitration in Italy is concerned.

That mainly depended on the controversial qualification of the arbitration phenomenon, with a view supporting its judicial nature as a perfect *alter ego* of state court proceedings, and another view underlying its merely private and / or contractual character.

In 2000 the Italian Supreme Court held that arbitration was an entirely private phenomenon and, as a consequence, that the arbitral award had the same effect of a contract and could not be treated on an equal footing to a judicial decision. In turn, the relation between arbitration and state courts was not considered a matter of jurisdiction, but an issue related to the merits of the case, in particular, an issue regarding the validity of the arbitration agreement.

This decision has been strongly criticised by most scholars, who supported the thesis of the jurisdictional nature of arbitration.

The latter view has been adopted by the new Italian Arbitration Law, enacted in 2006, which contains several provisions reflecting the jurisdictional nature of arbitration. Finally, in 2013 two important decisions restated this new approach.

On one side, the Italian Supreme Court, in the decision n. 24153, on the assumption that arbitration has a jurisdictional nature, stated that a conflict of jurisdiction between Italian state courts and domestic arbitration is subject to the same principles and rules governing the conflict of jurisdiction between Italian state courts, while a conflict between Italian state courts and international arbitration is subject to the rules governing conflicts between Italian and foreign state courts

On the other side, the Italian Constitutional Court, in the decision n. 223, held for the first time that a *translatio iudicii* between arbitration and state court proceedings is admissible under Italian legal system, with the consequence that, following a dismissal of the claim by, respectively, a state court and an arbitral tribunal because of the existence or inexistence of an arbitration agreement, does not preclude the claimant to refer the claim before the competent body, without incurring in any time limitation or forfeiture.

While, following the adoption of the new Arbitration Law and the new trend of the Italian case law, the jurisdictional nature of arbitration is currently undisputed, still some issues remain outstanding.

For example:

(i) are the procedural time limits, provided for judicial proceedings, binding in the proceedings transferred before an arbitral tribunal after the declination of jurisdiction by state court?

(ii) which is the relevance of the evidence produced in the first procedure?

(iii) which is the relevance of the interim measures granted in relation to the first procedure?

(iv) assuming that the *translatio iudicii* operates from judicial proceedings to arbitration, can a party who joined the first proceedings be admitted in arbitration, even though it is not a signatory of the arbitration agreement?

(v) which is the relevance of a counterclaim brought by the defendant sued before the state court, if that claim falls outside the scope of the arbitration agreement?

The solution of the abovementioned issues requires a systematic analysis of all the relevant provisions introduced by the new Arbitration Law, along which a critical assessment of the principles and rules, as interpreted over the years by scholars and case law, governing the relations between state court proceedings.

I think that this task will greatly benefit from a discussion with specialists coming from different jurisdictions and having different cultural and legal backgrounds.

Is Arbitration Unfair to Consumers?

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In the United States, mandatory arbitration clauses have become increasingly common—in employment contracts, in contracts for medical services, in insurance contracts, in contracts for financial services, and in almost any kind of contract where consumers and other kinds of individuals are contracting with large corporate entities. Interestingly, corporations are less likely to include mandatory arbitration clauses in contracts with each other. So the question becomes, are these clauses unfair to the individuals involved?

Those who advocate against mandatory arbitration for individuals cite the lack of access to courts to resolve disputes, the closing off of opportunities for class action suits, the lack of a right to appeal, and the fact that many consumers are simply unaware that these clauses are in their contracts. Even if they

were aware, the lack of parity in bargaining power suggests that there is no real free choice in whether to agree to arbitration—if you want the service, you agree to arbitration.

Arbitration is theoretically cheaper and quicker, and more flexible in reaching outcomes, than court litigation. But there are those who say that is not necessarily so for individuals, who may end up paying the corporation's costs of litigation if they lose. There is currently a study in progress to evaluate whether arbitration outcomes actually favor corporate entities over individuals, as those who advocate against forced arbitration contend.

So the topic for discussion is whether the American approach to mandatory arbitration is fair. Hopefully, in an international conversation, we can share ideas about arbitration and how it is practiced in various countries, and find ways to learn from each other in thinking about the best techniques for using this mechanism for alternative dispute resolution.

Civil Procedure and Arbitration: What Practice Thinks of Benefiting from Practice

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At first sight, the flexibility and market driven aspects of arbitration give reason to believe that litigation in this domain will develop quickly, will adapt itself to the needs of the participants and will absorb technical developments rapidly. After all, the procedural rules of arbitration are in first instance determined by the parties themselves, who will shape these rules according to their interests. From this it follows, that the practice of arbitration can be seen as a laboratory for the development of best practices in civil litigation. The outcome of these experiments could then be used to remodel civil litigation to make it answer to the needs of modern societies.

Summarily testing these hypotheses by analyzing the developments in Dutch civil procedure law, Dutch arbitration law and the corresponding practices, will reveal that probably each of the assumptions mentioned cannot be supported by empirical data. Parties to arbitration leave the rules to be determined by the arbitrators, who as practicing lawyers and judges mostly copy the rules from the Code of Civil Procedure. Arbitration law has recently (2015) been recodified and became a mere copy of the rules of civil procedure, often introducing legal concepts into arbitration law that already existed in civil procedure for more than a century. Examples of changes in civil procedure that were based on arbitration practices cannot be found.

This calls for a deeper investigation of the attitude of those who are involved in both civil procedure and arbitration. By means of a survey directed at all lawyers (attorneys at law) and judges we try to get a clear picture of the actual interaction between both types of litigation. The survey is administered by email, merely asking to fill out some blanks and to answer some questions and then send the email back. We hope that the outcome of this survey will enable us to give some recommendations regarding the way practice in both fields can be exploited in such a way that the benefits of potential cross-fertilization between the two may be maximized.

The first results will be presented at the PPJ seminar in May 2016.

Power, Corruption and Autonomy - A Recent Swedish Example of a Public-Private Collision in the Section of Arbitration and Competition Law

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Sub headings:

1. Competition Law and Party Autonomy
2. Ordre Public under EU Law/Eco Swiss – consequences
3. The Swedish Judicial Review Procedure on Arbitration Awards and the Doctrine of Separability
4. The Swedish Supreme Court Ruling of 2015 – its background and context
5. The Balancing of Public and Private Interests; Control and Autonomy
6. The Balancing of Conflicting Public Interests
7. Concluding Assessment and the Future

Arbitration and Court Litigation in Poland: The Story of Two Separate Worlds

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In response to the topic of this year's PPJ I submit that arbitration and court litigation in Poland are two worlds separated by significant cultural, legal, economic and social differences. Therefore, they may be perceived as complementary, while the process of cross-fertilization does not exist between the two. My presentation will explore the reasons for this state of affairs.

Rapprochement of Arbitration and Court Proceedings in Issuing Provisional Measures - Possibilities and Limits

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A conventional wisdom that "interim relief, or the lack thereof, can have a substantial or even determinative effect on the outcome of any case, whether submitted to litigation or arbitration" provides an apt starting point for an analysis of rapprochement of arbitration and litigation in issuing provisional (interim) measures. Is this an area where arbitration and litigation increasingly resemble each other, or they remain differentiated? Can we talk about c**ross-fertilization or complementarity** between court litigation and arbitration in regard to provisional measures? What are the possibilities and limits? This contribution will try to provide answers for these questions, from both a legal and practical perspective.

While provisional measures have long been an attribute of court litigation, their embrace in arbitration is a relatively recent phenomenon. Several decades ago, there was a common understanding that only state courts provide an interim relief, and consequently no mention was made of an arbitrator's competence to grant provisional measures. From a prohibition as a starting point, the provisional measures of protection in arbitration had undergone dramatic evolutionary development, which for now has resulted in *ex parte* provisional measures.

From a legal perspective, quite apart from the general approach of this conference viz. whether practices and routines developed in arbitration may have a positive impact on changes in litigation practices; here we can talk about a reverse process of influence of civil litigation on arbitration. Namely, as a result of a gradual shift in arbitration (especially international one) towards the practice

that parties to an arbitration agreement seeking interim relief address first to the arbitral tribunal, rather than to the state courts, the interim measures as a separate area of the law of arbitration has constantly been upgraded and finally transformed in such a manner that the law governing arbitration in regard to this issue no longer differs radically from that covering litigation. From a legal perspective, it is definitely an area where litigation and arbitration increasingly resemble each other. This is confirmed in the revised version of UNCITRAL Model Law on International Commercial Arbitration of 2006, not only regarding the definition and scope of interim measures in arbitration, but also with respect to the whole regime of interim measures, including conditions for granting interim measures, preliminary orders, provisions for modification, suspension, termination, security etc. Notwithstanding the fact that the majority of states have yet to seriously consider the incorporation of these amendments into national laws, it seems that the revised version of UNCITRAL Model Law of 2006 regarding interim measures fits into the debate that arbitration is being undermined by "creeping legalism," "judicialization" or "incremental formalism".

The evolution of provisional measures has been clearly pointed out as an example of the judicialization of 21st century arbitration. Some new institutions and concepts have been transposed *mutatis mutandis* from litigation into the realm of arbitration, in order to overcome the limitations and hurdles of arbitrator's competence in regard to provisional measures. The emergency arbitration concept which was attached to the scope of arbitration competences is the most remarkable one, tended to become a hallmark of most sets of arbitration rules. It derives from the litigation practice which demonstrates that provisional measures of protection are usually in the highest demand before the case proceeds to trial. Still, despite its increasing popularity, the concept is not without its drawbacks particularly when compared with the court-ordered provisional measures, and these drawbacks should be clearly pointed out.

On the other hand, it seems that the evolution of provisional measures in arbitration went further or beyond the possibilities of what was expected. *Ex parte* provisional measures are a quite good example. While *ex parte* provisional measures are an established characteristic in court litigation in almost all common law and civil law jurisdictions, their admissibility and aptness are still very much disputed in arbitration (particularly international one). The process of granting *ex parte* relief in arbitration renders the whole exercise of doubtful value and thus poses the question whether it might be better to leave the issue of *ex parte* relief to the state courts.

From a practical perspective, it seems that for now the judicialization of arbitration regarding provisional measures is basically theoretical and normative in nature and thus, deprived of considerable practical importance, if any. Whereas provisional measures are vital and almost daily tool in litigation, some surveys and statistics suggest that provisional measures are not applied too

frequently in arbitration. The frequency of granting provisional measures in arbitration at this moment **apparently** does not give us material to support the debate on the positive impact of arbitration on changes in litigation practices in this area.

Arbitration as a Matter of Inspiration for Regular Courts in Norway

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Norwegian civil procedure law consists of two radically different codes on handling of civil cases before a state court and handling of such cases before an arbitration court. The Arbitration Act is from 2004, and the general Dispute Act is from 2005. Arbitration and general civil procedure law is, a general remark, handled rather isolated in Norway. There is hardly any tradition for using rules or traditions concerning arbitration as an inspirations for rules concerning general civil procedure. However, there are a few rather limited aspects of general civil procedure law that has been somewhat influenced by the rules concerning arbitration and I will try to highlight some of those in my speech.

Standard of Proof in International Arbitration: An Uncharted Territory for Cross-fertilization?

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In a great number of (national and international) cases the resolution of a dispute hinges on the adjudicator's decision on factual rather than legal issues. The applicable standard of proof determines whether the evidence a party has produced in support of its factual allegation is sufficient to consider the facts in question proven (in civil or other proceedings). Different standards have been developed in common law and civil law jurisdictions. In many civil law jurisdictions the "inner conviction" of the judge plays a central role. The standard applied in a number of common law jurisdictions is referred to as "preponderance of the evidence" or "balance of probabilities". There is little authority on the question which standard of proof applies in arbitral proceedings. Notably, the most successful soft-law instrument in the field, i.e. the IBA Rules on the Taking of Evidence in International Arbitration, does not address the relevant standard of proof.

The first part of the presentation will briefly compare the standard of proof most often applied in common law jurisdictions and civil law jurisdictions. After introducing the regulatory framework, the second part will deal with the standard of proof applicable in international arbitration and the intricate conflict of laws issues that might arise in this context. Finally, the third part will address the question

whether international arbitration can learn from the approaches developed in state court litigation on the one hand. On the other hand, the question will be raised whether a "harmonized standard of proof" should apply in international arbitration and whether the emergence of such transnational approach can already be observed in practice.

Professional Secrecy, Legal Professional Privilege: Same or Different in Arbitration and Civil Litigation?

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The question is whether the advocates representing their clients in civil lawsuits before state courts do share the same legal professional privilege as advocates representing their clients in arbitration? The term legal professional privilege is already a common European term coined by the Court of Justice of the EU based on fusion on the one hand of common law litigation privilege and legal advice privilege and on the other hand of the the continental *secret professionnel* and *Anwaltsprivileg*. The differences between a state's judicial system and arbitration as private institution are well explored. However, the question is, whether privileges applied in judicial proceedings can be applied also to arbitration? The issue seems to be well explored at the level of international commercial arbitration. However, in the end the difference seems to be between common and civil law legal systems.

In the beginning the comparative approach to legal professional privilege will have to be explored. Indeed, a common law lawyer would used to common law legal privilege would raise the brow when when reading the title when documents not intended to a communication with the client are concerned, a civil law lawyer would on the other hand respond that legal privilege is applied *in personam* to the independent lawyer. Issues of legal privilege seem to play an important role also on a very high international level, where lawyers representing foreign governments accused of questionable acts complain of interference by the government of the *forum.*

Some years ago legal writers writing on legal professional privilege stated that a preparation of arbitration in countries where legal professional privilege is not recognised in arbitration requires a different approach. This opens the question if both types of dispute resolution apply the same set of rules. As law of civil procedure is by its tradition always linked to the performance of a State's authority on a given territory over certain individuals (*imperium*), an assessment of laws of civil procedure will necessarily have to be limited to comparative remarks. On the other hand, the arbitration as a product of party autonomy might be at least in cases of international arbitration completely severed from State's law (it is even contended that a new *lex mercatoria* is being developed in international

arbitration. However, to a civil law lawyer such a *lex mercatoria* seem to be a carbon copy of *common law* due to the influence of big American lawfirms on arbitration).

On Increasing "Judicialization" of Arbitral Rules in Croatia: Evolution of Zagreb Rules in the 1992-2016 Period

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The first Zagreb Arbitration Rules (1992) were mostly inspired by UNCITRAL Arbitration Rules (1976), with very few exceptions reflecting modern tendencies within leading arbitration institutions (primarily, ICC and VIAC), UNCITRAL Model Law, as well as some domestic procedural rules. Being introduced in early 90's characterized by former regulatory deficiency in the field of international arbitration, they were designed to regulate only arbitration with international element. Ten years later, the new Zagreb Rules (2002) merged with purely domestic arbitration rules and introduced a unique set of rules both for arbitration with and without international element. Although one of main ideas was to design new rules which would follow the solutions of new Arbitration Act (2001), they integrated some elements which can hardly be connected to arbitration practices. Beside introducing a wide possibility to issue payment orders (German *Mahnbescheid*), many of the provisions were clearly following Croatian Code of civil procedure. Amendments of the Zagreb Arbitration Rules of 2011 only increased such "judicialization" of arbitration rules. Even when recent amendments (2015) introduced solutions characteristic for most of the modern arbitration rules, such as expeditious proceedings, they failed to abandon formalism in conducting evidence, which is inconsistent with current best arbitration practices. This paper tries to present the increase of judicial elements in Zagreb Arbitration Rules since 1992, with special emphasis on amendments regarding rules on the taking of evidence, arbitration costs, service of documents, different types of decisions and general style of drafting.

The Interrelationship between Arbitration and Civil Litigation in the South African Legal System

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1. Introduction

The aim of this paper is to discuss the way in which arbitration is applied domestically as well as internationally in the South African legal system, as well as the interrelationship between arbitration and civil litigation in certain areas such as party autonomy and jurisdictional issues, presentation of evidence and means of recourse.

2. Domestic arbitration

The following aspects will be briefly discussed:

(a) The impact of the Constitution of the Republic of South Africa on arbitration
(b) The Arbitration Act 42 of 1965
(c) The Commission for Conciliation, Mediation and Arbitration ("CCMA")
(d) Other tribunals

3. International arbitration

The following aspects will be briefly discussed:

(a) UNCITRAL Model Law on International Commercial Arbitration
(b) Proposed draft International Arbitration Bill for South Africa (South African Law Commission, Project 94 of 1998)

4. The interrelationship between arbitration and civil litigation

The following aspects will be briefly discussed:

(a) Party autonomy and jurisdictional issues
(b) Presentation of evidence
(c) Means of recourse

5. Proposals for reform

The proposals by the Law Commission (Domestic Arbitration, Project 94 of 2001) will be briefly discussed.

6. Conclusion and recommendations

The paper will be concluded with some general remarks as well as recommendations on the way forward and possible future developments in the field of arbitration in the South African context.

Arbitrarily barred from the courts? 1

The motives and efficiency considerations behind Mandatory Employment Arbitration

Annie de Roo **Rob Jagtenberg**

Erasmus Universiteit Rotterdam

Desiderius Erasmus

Professor Piet Sanders
Arbitrator
First Dean School of Law

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What is (not) arbitration? 2a

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Arbitration is a definitive alternative to courts:

private adjudication based on parties' agreement, i.e.

- Privately appointed neutral imposes binding decision
- Binding decision 'easily' enforceable: courts precluded from reviewing substance
- Enabling legal framework:
  - Treaty law → New York Convention
  - Domestic laws, rules of arbitral institutions
  - For dispute submitted, parties may preclude strict law application

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What is (not) arbitration? 2b

- If no decision→ negotiated or mediated solution (mediation)
- If decision but not binding→ opinion, recommendation
- Decision (mostly) binding but not enforceable → quasi-arbitration
- Examples:
  - Court-annexed 'arbitration' in US federal/state courts; mostly smaller monetary claims – binding unless file for trial de novo
  - Expert determination → mostly factual issues
  - *Tierce decision obligatoire* – 'bindend advies' → emanating from party autonomy, binding contractually

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The dispute resolution landscape 3

Netherlands' survey all civil cases, year 2000 (empirical survey)

- 2,000 genuine arbitration → mostly commercial
- 4,000 quasi-arbitration → mostly consumer
- 9,000 mediation → mostly divorce, out-of-court
- 55,000 court litigation→ only adversarial (including non-contentious: 100,000)

! Baseline of legal disputes: approx. 2 million

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Voluntary – Mandatory 4

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Agreement to arbitrate: two forms

- Any future disputes → arbitration clauses in e.g. contracts
- After a dispute has arisen → *compromis*/submission agreement

? As to clauses: is small letter print in one parties' standard terms (adhesion contract) 'voluntary'?

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Proliferation over subject areas 5a

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The issue of 'arbitrability'

Allowed → rights that parties can freely dispose of?

Repeat player to Repeat player (Gallanter)
B to B > commercial
G to G > inter-state, Permanent Court of Arbitration
B to G > investment, ICSID; TTIP-ISDS?

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Proliferation over subject areas 5b

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Repeat player to One shotter
Employer – individual employee
Producer – individual consumer

Collective employment →
industrial disputes?
Collective consumer →
class actions, mass damage claims?

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Historical development Labour ADR in the EU 6a

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- Employment relationship and labour law
- 19th and 20th century → industrialization
- Employer creates jobs → opportunities to make a living
- Employer key to growth national income and prestige

!

- Initially only individual employment disputes recognized → *Le Maître est cru sur son affirmation*
- From 1875 onwards → recognition 'constructive' role unions, rise of collective bargaining, governments abstain/support

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Historical development Labour ADR in the EU 6b

- Individual and collective labour disputes
- Over rights – over interests → failure to agree on new collective bargaining agreements
- WW I and WW II → compulsory arbitration
- 1950-present → 'social Europe'
- European Social Charter → support collective bargaining → voluntary arbitration as means of last resort

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Historical development Labour ADR in the EU 6c

- (Quasi-)arbitration sometimes written into collective bargaining agreements for disputes over interpretation → collective, occasionally also extending to individual employees – Trade Union members
- Individual disputes over statutory rights
  - → to court
  - → in France, Germany, UK → specialized courts
  - → involving social partners
  - → integrated or annexed conciliation efforts

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Current legal framework in the EU 7

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Arbitration over individual statutory employment rights

Prohibited →

France, Germany →
reference to public policy OR
(partly) allowed but rarely used (UK, NL)

Rights of access to court →

Article 6 ECHR

The 2010 ECtHR case of *Suda v Czech Republic* → arbitration mandated by clause in adhesion contract constitutes violation of Article 6 → void and unenforceable

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Historical development Labour ADR in the US 8

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- Initially individual contracts → after recognition trade unions
- Rise collective bargaining agreements – collective dimension
  - 1947: Federal Mediation & Conciliation Service established
- 1950s onwards → grievance procedures for unionized workers – two step: mediation → arbitration
- USSC 1974 *Alexander v Gardner-Denver* case → no mandatory arbitration allowed in regard of individual employees claiming statutory rights (c.q. 1964 Civil Rights Act)

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Current legal framework in the US 9

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- 1980s → CJ's Burger and Rehnquist praise ADR
- USSC 1991 *Gilmer v Interstate/Johnson-Lane* case:
  A stockholder employee bound – through clause in employment contract – to arbitrate a statutory age discrimination claim

Lower courts attempted to narrow the applicability of *Gilmer,* however in *Circuit City Stores v Adams* (2001) → Federal Arbitration Act applies to basically all employment contracts → no 'little guy' exception

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The debate over pre-dispute mandatory arbitration 10a

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Critics:

- Eliminates claimant's right to present claims to a judge or jury
- Prevents litigants from setting public precedents
- Clauses provide for limited discovery, shorten statute of limitation
- Impose non-neutral arbitrators – repeat player effects, including 'pairing'
- Eliminates remedies that would be available in courts
- Since employers increasingly use mandatory arbitration – workers have not much choice → 'unconscionability'

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The debate over pre-dispute mandatory arbitration 10b

"the USSC allows birds of prey to sup up workers and consumers

(Carrington & Haagen, Sup.Crt. Law journal 1996)"

Defenders:

The benefits companies accrue will be passed along to customers or employees in the form of lower prices or higher salaries.

So, mandatory arbitration is beneficial to the public at large.

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Empirical data on use, outcomes etc. in the US 11a

Alex Colvin (Cornell) →

An empirical Study of Employment Arbitration 2011

- The employee win rate lower in arbitration than in litigation
- In cases won, the amounts awarded in arbitration substantially lower in litigation
- Disposition time in arbitration substantially shorter than in litigation
- Arbitration fees ($ 6,500) nearly always fully paid by the employer
- Estimates 20% of all employees use arbitration clauses

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Empirical data on use, outcomes etc. in the US 11b

Alex Colvin (Cornell) →
An empirical Study of Employment Arbitration 2011

- strong evidence of a repeat employer effect – in two ways:
  1. Win rates and award amounts significantly lower where employer involved in multiple arbitration cases
  2. Significant repeat employer-arbitrator pairing effect → lower win rates and smaller damage awards where the same arbitrator is involved in more than one case with the same employer

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Empirical data on use, outcomes etc. in the US 11c

Lipsky et al (Cornell) →
Mandatory Employment Arbitration; Dispelling the Myths 2014

- 1997 and 2011 Surveys of Fortune 1000 corporations on use of ADR
- Most employers now prefer mediation
- 70% of employers rarely or never use arbitration
- 14% of employers rarely or never use mediation
- Arbitration becoming as costly and complex as litigation

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Assessment: EU-US disparities; pattern, motives 12

- Companies' desire to decrease legal costs and liabilities – universal?
  - US courts more hostile? In consumer case: jury, class action
- Confidentiality – universal?
- (non-)neutrality arbitrators?
  - US judges *pro* arbitration in view of their own future careers as arbitrators: JAMS is one of the 3 main providers – next to AAA and FINRA
- Political culture – US companies more political clout (campaign contributions); EU more protective of consumers and workers (socialism; trade union resistance)

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Convergence? 13

- In the US, it was just a 'perfect storm' (Corbin)
- Arbitration Fairness Act (AFA, 2009) initiative
- Adversarial nature arbitration is inconsistent with values of teamwork and employee engagement (Lipsky)
- Large employers take a strategic view of conflicts – ICMS
- De-unionization/individualization; yet sharing – wiki-leaks
- ***But*** also – strategic behaviour of overburdened courts

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Whose costs? Whose efficiency? 14

- What standard for settling disputes publicly or privately?
  - Private customer satisfaction?
  - The Treasury?
  - Society at large?
- Fictitious case of bank employees, taking toxic derivatives trading to court
- Social Return on Investment Analysis →
  - Identify all people affected and their costs, including (monetized) values that matter to them

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The future 15a

- Is the employment relationship itself bound to disappear?
- A further inconvenient truth → enhanced robotization
- Brynjolfson & McAfee (MIT) → The Second Machine Age
- Combined with population explosion and mass economic migration → in search of 3.5 billion jobs
- Transnational Corporations do not create but relocate work; anti-free trade mood
- **In the end**: BIEN – Basic Income European Network**?**

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The future 15b

Dutch (secret) lobby for international (intra-European) investment arbitration

Partners in this arbitration business:

France

Germany

Austria

Finland

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Arbitration/ Litigation Hybrids in Family Disputes

Dr Wendy Kennett

Recent development of family arbitration

- Arbitration permitted in many US states, several Canadian provinces, Australia, Germany, England, Scotland
- Legislation governing family arbitration
  - Mainly minor amendments to family law legislation and arbitration legislation
  - Proposed Uniform Law in US
- Establishment of institutions to support arbitration/regulate arbitrators (e.g. IFLA)
- Interest expressed elsewhere e.g. Spain, South American states
- Isolated examples of arbitration in relation to financial disputes in e.g. France

Barriers to family arbitration

- Attitudes towards private ordering
- Public and private law aspects of family law
- Civil code
  - E.g. Art.1814 Spanish Civil Code – arbitration only available for rights
- Case law
  - E.g. *Hyman v Hyman* [1929] AC 601

Hyman v Hyman [1929] AC 601

"the power of the Court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but of the public, and **the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the court** or preclude the court from the exercise of that jurisdiction"

Per Lord Hailsham LC

S v S [2014] EWHC 7 (Fam)

- s. 25 Matrimonial Causes Act 1973 lists eight factors to which the courts should have regard in making financial orders
- White v White [1999] Fam 304 per Thorpe LJ – magnetism of one, two or three of the factors in the individual case – giving those factors decisive importance

"Where the parties have bound themselves … to accept an arbitral award of the kind provided for by the IFLA Scheme, this generates, as it seems to me, **a single magnetic factor of determinative importance**" per Sir James Munby (President of the Family Division)

Incentives to allow family arbitration (UK)

- Arguments for 'private ordering'
  - Although preference for mediation
- Cost of litigation
- Overburdening of Family Court
- Removal of legal aid for non-domestic violence cases

Problem areas

- Reality of consent? Problem of power imbalance
- Scope of arbitrable matters (Australia – only financial matters; various US states, Canada, Scotland – includes orders relating to child support and child residence and contact)
  - England – originally limited to financial matters, about to launch arbitration in relation to child arrangements
- Ongoing relationship – possible need to amend orders
  - Arbitrator(s) *functus officio*
- Arbitration clauses in prenups?
- Possibility of appeal?

Imbalance of power

- Qualification and training requirements for arbitrators
  - E.g. reg. 67B of the Australian Family Law Regulations 1984: a person may be an arbitrator if that person is a legal practitioner and has either been accredited as a family law specialist by a State or Territory legal professional body or has practised as a legal practitioner for at least five years and, as a minimum, 25% of their practice has been in family law matters.

Imbalance of power

- British Columbia Family Law Act Reg 347/2012: member of the Law Society of British Columbia can act as an arbitrator if meeting Law Society's training and practice requirements:
  - At least 10 years full-time practice of law or the equivalent in part-time practice or as a judge or master
  - Sufficient knowledge, skills and experience relevant to family law to carry out the arbitral function in a fair and competent matter
  - 40 hours of training in how to conduct an arbitration, which must include, family dynamics
  - 14 hours of approved training in family violence issues

Imbalance of power

- Screening for domestic violence
  - British Columbia Arbitration Act s.2.1(3)
  - Cf Michigan Compiled Laws § 600.5072 : arbitration not recommended for cases involving domestic violence but exclusion can be waived if party concerned is informed on the record concerning (a) the arbitration process, (b) the suspension of the formal rules of evidence, and (c) the binding nature of arbitration

Parties' lack of experience

- Requirement of institutional arbitration?
  - Family arbitration institutions emerging: mainly for professional regulation and promotional purposes
  - Legal requirement of membership – or other official recognition?
    - Relevance of IFLA to recognition of family arbitration awards in England?
    - The Australian Institute of Family Law Arbitrators and Mediators (AIFLAM) has been nominated by the Law Council of Australia as the body competent to maintain a list of arbitrators meeting qualification requirements

Position of third parties

- Children of the family as third parties?
  - Arbitration involving some matters relating to children permitted in e.g. US and Canada without discussion of child as third party
  - Academic discussion in Germany emphasising role of child as third party (with consequences for scope of arbitration and requirement of separate legal representation for child)

Application of mandatory rules

- Some US States (e.g. Indiana Code 34-57-2; Michigan Consolidated Laws 600.5078) – arbitrator must comply with state laws on child support payments
- Requirement of application of the substantive law of the seat to make agreement/award enforceable
  - E.g. Ontario Arbitration Act 1991 (amended 2006) requires application of the law of Ontario, or of another Canadian jurisdiction if expressly chosen
    - Amendment was designed to prevent 'shari'a arbitration'
  - British Columbia Arbitration Act 1996 (amended 2011) – mandatory application of 'best interests of the child' standard

Challenges to an arbitral award

- Arbitration is usually a single instance procedure: the award is **final**
- Appeal rarely possible
  - cf English Arbitration Act 1996 s.69
- Challenge is by way of **annulment**
  - No valid arbitration agreement
  - Procedural unfairness
  - Excess of power
  - Arbitrator not independent and impartial

Annulment and appeals in family arbitration

- Modification of rules on finality of arbitral awards in context of family arbitration
  - E.g. in US – arbitration of disputes relating to child arrangements
    - Recourse not limited to annulment on procedural grounds – may obtain a rehearing, or a review of the case based on a transcript of the hearing (Michigan: *MacIntyre v MacIntyre* (2005)*)*
    - Test? Whether the best interests of the child have been observed; or if the award threatens harm to the child (New Jersey: *Fawzey v Fawzey* (2009)*)*

Annulment and appeals in family arbitration

- Appeal also possible in Australia and Canada, specifically in family law disputes
  - Australia - s.13J of Family Law Act 1975 – appeal on a point of law (arbitration being limited to property and financial disputes)
  - Ontario - reg.2 of Regulation 134/07 requires that any arbitration agreement contain a choice by the parties from a range of appeal options
  - British Columbia – Arbitration Act 1996 s.31(3.1) a party may appeal "on any question of law, or on any question of mixed law and fact, arising out of the award."

NB England and Wales : appeal on a point of law already existing under s.69 Arbitration Act 1996

Length and vicissitudes of relationship

- Marriage/civil partnership/cohabitation likely to be longer and more varied than commercial contractual relationship
- Doubts as to whether parties should be permitted to bind themselves to arbitration in a prenup
  - Cases exist where prenuptial agreement enforced: Australia, Germany, some US states
  - Other US states – only submission agreements after dispute has arisen
  - England until recently did not enforce prenuptial agreements – still only discretionary and scepticism remains

Further hybridisation – a mixed economy in California

- Identified in writing on family arbitration as taking a restrictive approach
- But – other institutions have some of the features of arbitration and reduce the demand for it
  - Mediation with e.g. access to third party information by 'mediator'
  - Custody evaluators
  - Special referees
    - Includes Parenting Co-ordinators
    - Agreement of parties; court appointment; outside normal court procedures; appealable
  - Private judges

Conclusions

- Family arbitration is not widely used except in the US – but growing in the UK
- It has been found useful in certain types of dispute
- But the special features of family law mean that 'arbitration' has been adapted and has characteristics quite distinct from those in commercial arbitration (especially in relation to annulment)
- Nevertheless – the number of disputes coming to courts are reduced because many parties do not challenge an award

Conclusions

- Litigation learning from arbitration?
- Expansion of arbitration as it absorbs elements from litigation that allow it to reflect public interest concerns ⇨ less litigation

Faculty of Law, University of Zagreb

Who Bears the Costs of Partial Victory in Arbitration and Litigation Proceedings?

Marko Bratković, PhD candidate

Public and Private Justice 2016

Arbitration and Court Litigation: Cross-Fertilization or Complementarity?

Dubrovnik, May 23-27, 2016

Who Bears the Costs of Partial Victory in Croatian Litigation Proceedings?

The Civil Procedure Act

Article 154 (2)

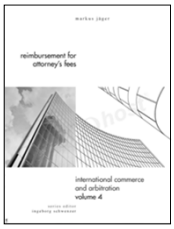
If **a party succeeds** in the proceedings **in part,**
the court may,
having **regard to the success achieved,**
order that each party shall bear its own costs
or
that one party shall reimburse the other party and the intervener
the corresponding part of the costs.

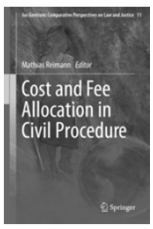
(*Official Gazette SFRY* nos. 4/77, (…) 35/1991; *Official Gazette RC* nos. 53/91, (…) 89/14)

Structure and content

1. Costs of Litigation Proceedings in Croatia from a Comparative Perspective
2. Costs of Partial Victory in Croatian Case Law. *Klauz v. Croatia*
3. Costs of Partial Victory in the International Arbitration Practice
4. An Ideal Model of the Allocation of Costs in Case of Partial Victory in Arbitration and Litigation Proceedings?

Costs of Civil Litigation - A Comparative Perspective





To Shift or Not to Shift?

- **American Rule**

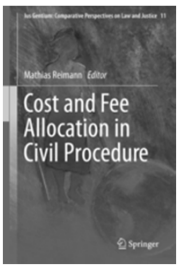
- each side bears its own costs

- **costs follow the event**

- *the English rule*
- *loser pays* principle

(…) such a dichotomy is hopelessly simplistic as well as virtually useless. (Reimann, 2012)

Costs of Civil Litigation - A Comparative Perspective



Who pays?

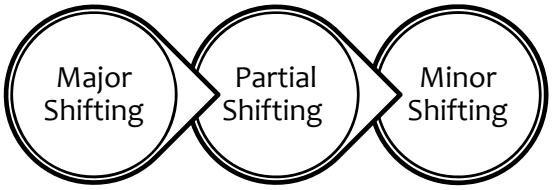
How much?

Whose money?

(1) To shift or not to shift?

(2) What kinds of expenses?

(3) In whole or in a part?



Costs of Civil Proceedings

The Civil Procedure Act

Article 151

(1) The costs of proceedings involve **disbursements made during, or in relation to, the proceedings.** ***What kinds of expenses?***

(2) The costs of proceedings also **include a fee for services of an attorney and other persons entitled to a fee by law**.

Article 154

(1) A party who loses a case completely shall reimburse the costs of the opposing party and his or her intervener. ***To shift or not to shift?***

(2-4) …

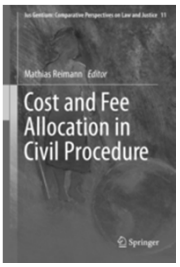
Article 155

(1) In deciding which costs shall be reimbursed to a party, the court shall take into account only those **costs which were necessary** for the conduct of the proceedings. When deciding which costs were necessary and their level, the court shall carefully consider all the circumstances. ***In whole or in a part?***

(2) If there is a prescribed scale of attorney's fees or other costs, these costs shall be awarded **according to that scale**.

(*Official Gazette SFRY* nos. 4/77, (…) 35/1991; *Official Gazette RC* nos. 53/91, (…) 89/14)

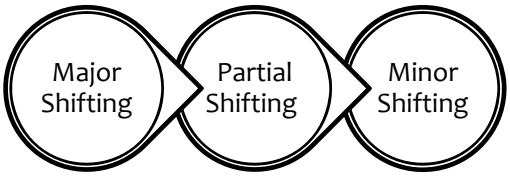
Costs of Civil Litigation - A Comparative Perspective



(1) *To shift or not to shift?*

(2) What kinds of expenses?

(3) In whole or in a part?

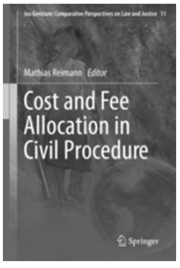


Who pays?

How much?

Whose money?

Costs of Civil Litigation - A Comparative Perspective



Exceptions and Modifications

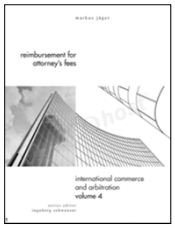
Special Types of Litigation

Party-Based Exceptions

Sanctions for Causing Unnecessary Costs

Split Outcomes

Settlements



Modifications

Unnecessary Attorney`s Fee

Partial Win

Settlement

Equity

Who Bears the Costs of Partial Victory in Croatian Litigation Proceedings?

The Civil Procedure Act

Article 154 (2)

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the court may,
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order that each party shall bear its own costs
or
that one party shall reimburse the other party and the intervener **the corresponding part** of the costs.

(*Official Gazette SFRY* nos. 4/77, (…) 35/1991; *Official Gazette RC* nos. 53/91, (…) 89/14)

Who Bears the Costs of Partial Victory in Croatian Litigation Proceedings?

Opinion of the Civil Division of the Supreme Court (1980)

In the event of a partial success in [civil] proceedings (Section 154 paragraph 2 of the Civil Procedure Act) it is necessary to interpret the terms **'partial success'** and **'corresponding part of the costs'** not only **qualitatively but also quantitatively**, that is, by taking into account [both] the substance and the quantum of the allowed or dismissed part of the claim.

(…)

Klauz v. Croatia

(Application no. 28963/10)

- **1997** • The applicant was arrested and brought to a police station where he was beaten by a police officer.
- **1998** • The applicant brought a civil action against the State in the Zagreb Municipal Court, seeking compensation for the ill-treatment sustained. He **sought** a total of about **45,000 euros**.
- **2002** • The Municipal **Court awarded** the applicant a total of **2,000 euros** with statutory default interest and about 470 euros in costs **and ordered him to pay the State 3.500 euros in costs.**
- **2006** • The Zagreb County Court dismissed an appeal by the applicant and upheld the first-instance judgment.
- **2007** • The Supreme **Court** reversed the lower courts' judgments in part and **awarded** him a total of about **3,200 euros**, together with statutory default interest and about 1,000 euros in costs. It ordered him **to pay the State 2,500 euros in costs**.
- **2009** • The Constitutional Court dismissed the applicant's constitutional complaint.
- **2013** • The European Court of Human Rights found that there has been a violation of Article 6 § 1 of the Convention and of Article 1 of Protocol No. 1 to the Convention.

Klauz v. Croatia

(Application no. 28963/10)

- (…) in the present case the domestic **courts applied that provision mechanically** without having sufficient regard to the **specific circumstances** of the applicant's case, especially the fact that it concerned compensation for non-pecuniary damage sustained as a result of a criminal offence of ill-treatment by the police rather than an ordinary civil-law dispute between private parties.
- The Court notes that the rationale behind the **"loser pays" rule** and the related rule concerning costs outlined above is to avoid unwarranted litigation and unreasonably high litigation costs by dissuading potential plaintiffs from bringing unfounded actions or submitting exaggerated claims without bearing the consequences. The Court therefore considers that, by discouraging ill-founded litigation and excessive costs, those rules **generally pursue the legitimate aim of ensuring the proper administration of justice and protecting the rights of others**.
- the Court considers that the interference in question was provided for by law, was in the general interest **but** did not strike the requisite fair balance between the general interest involved and the applicant's right to peaceful enjoyment of his possessions, that is to say, **was not proportionate**.

Mathematical efficiency?

45,000 claimed		
3,200 awarded	the claimant' s success	7 %
41,800 dismissed	the defendant' success	93 %

costs	
the claimant	14,000
the defendant	2,700

How much has to pay each party to their opponent?				
	the claimant		the defendant	
1.a	7 % of 14,000	**1,000**	93 % of 2,700	**2,500**
1.b		Ø	2,500 – 1,500	**1,500**
2.		Ø	(93 – 7) % of 2,700	**2,300**

All amounts are in euros.

Who Bears the Costs of Partial Victory in International Arbitration Proceeding?

ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

AMERICAN ARBITRATION ASSOCIATION®

SWISS RULES OF INTERNATIONAL ARBITRATION

ICC INTERNATIONAL CHAMBER OF COMMERCE

DIS Deutsche Institution für Schiedsgerichtsbarkeit e.V. German Institution of Arbitration

VIAC Vienna International Arbitral Centre

LCIA Arbitration and ADR worldwide

Who Bears the Costs in International Arbitration Proceeding?

DIS-Arbitration Rules 98

35.2 In principle, **the unsuccessful party shall bear the costs of the arbitral proceedings**. The arbitral tribunal may, taking into consideration the **circumstances of the case**, and in particular where each party is **partly successful and partly unsuccessful**, order each party to bear his own costs or apportion the costs between the parties.

LCIA Arbitration Rules (2014)

28.4 The Arbitral Tribunal shall make its decisions on both Arbitration Costs and Legal Costs on the general principle that **costs should reflect the parties' relative success and failure** in the award or arbitration or under different issues, except where it appears to the Arbitral Tribunal that in the **circumstances** the application of such a general principle would be inappropriate under the Arbitration Agreement or otherwise. (…)

Swiss Rules (2012)

40.1 (…), the costs of the arbitration shall in principle be borne by the **unsuccessful party**. However, the arbitral tribunal may apportion any of the costs of the arbitration among the parties if it determines that such apportionment is reasonable, taking into account the **circumstances of the case**.

SCC Rules (2010)

44 (…) the Arbitral Tribunal may in the final award upon the request of a party, order one party to pay any reasonable costs incurred by another party, including costs for legal representation, having regard to the **outcome of the case** and other relevant circumstances.

Who Bears the Costs in International Arbitration Proceeding?

ICC Rules (2012)

37.5 In making decisions as to costs, the arbitral tribunal may take into account such **circumstances as it considers relevant**, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.

Vienna Rules (2013)

37.2 Unless the parties have agreed otherwise, the arbitral tribunal shall decide on the allocation of costs **in the manner it deems appropriate**.

Who Bears the Costs in International Arbitration Proceeding?

DIS-Arbitration Rules 98

35.2 In principle, **the unsuccessful party shall bear the costs of the arbitral proceedings**. The arbitral tribunal may, taking into consideration the **circumstances of the case**, and in particular where each party is **partly successful and partly unsuccessful**, order each party to bear his own costs or apportion the costs between the parties.

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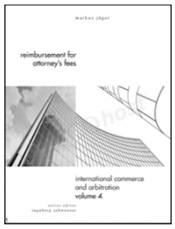
Relevant or *specific* circumstances of the case?



- **1. (partial) win/loss**
- 2. no decision on the merits
- 3. unsuccessful claims/means
- 4. (unreasonable) behavior
- 5. subjective reasoning of the arbitral tribunal (*equity* et al.)

Diverse approaches

- **ICC Case no. 12421, 2005**

- **claimant was only awarded € 10** in nominal damages for breach of contract

On the basis of the breakdown of costs (…), **we fix** the amount of X's recoverable legal **costs and expenses at £ 450,000**, which is slightly in excess of 70% of the amount claimed.

- **ICC Case no. 13278**

Under the circumstances, **taking into account the claims and the outcome**, including **the amount awarded** and **the fact that Claimant had to start an arbitration to recover its due**, as well as **the parties' conduct** in the arbitration, especially **the need for three instead of one witness hearing** occasioned by Respondent, the Sole Arbitrator in the exercise of her discretion finds that **Claimant shall bear 30% and Respondents 70% of costs** of the arbitration fixed by the ICC International Court of Arbitration.

Diverse approaches

- **ICC Case no. 11440, 2003**

The ratio for allocating the costs between claimant and respondent is **71.48% and 28.52%.** Based on that ratio, the costs of arbitration and the parties' costs have to be allocated as follows: In principle thereof, **claimant is to carry 71.48% and respondent 28.52% of the total costs** of this arbitration.

Mathematical efficiency?

45,000 claimed		
3,200 awarded	the claimant' s success	7 %
41,800 dismissed	the defendant' success	93 %

costs	
the claimant	14,000
the defendant	2,700

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1.a	7 % of 14,000	**1,000**	93 % of 2,700	**2,500**
1.b		Ø	2,500 – 1,500	**1,500**
2.	**the Welamson doctrine**		(93 – 7) % of 2,700	**2,300**

All amounts are in euros.

Compensatory damages claimed

- **ICC Cases nos. 3099 and 3100, 1979**

Although the amount of the **claimant's claim** for compensatory damages and interest, recognized in principle has been considerably **reduced (from USD 13 mill. to USD 1,350,000**), **the court did not reduce the reimbursement for legal costs**, since, 'in actual fact,' the claimant "has been satisfied in all parts of it claim. The exaggeration of the claim has, however, not resulted in a complication of the proceedings"

- **ICC Case No. 6527, 1991**

(…) as far as the costs incurred by the parties, considering that the claimant's **claim was justified as to the *an debeatur* but excessive as to amount** of the requested compensation, the arbitral tribunal considers it appropriate for **each party to bear its own legal costs** and for the parties to share equally the other costs of the proceedings.

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At its discretion, the court shall apportion such costs taking into account the circumstances of the case.

Thank you for your attention!

marko.bratkovic@pravo.hr

MUTUAL RELATIONSHIP AND CROSS-FERTILIZATION OF ARBITRATION AND LITIGATION IN ROMAN LAW

Doc. Dr. Ivan Milotić

Faculty of Law, University of Zagreb

Primary form of dispute resolution in Roman law: arbitration or litigation?

Clear distinction *arbitration – litigation* in Roman law can not be determined by modern standards

↓↓↓

Litigation: institutionalized procedure, private dispute resolution, no permanent courts and judges, State enforcement

Arbitration: predominately private, *ad hoc*, unenforceable, *arbitrium* is a senior generic term

What do arbitration and litigation have in common?

Compromissum ad similitudinem iudiciorum redigitur et ad finiendas lites pertinet (Paul., D.4.8.1.).

↓↓↓

Final and **binding** dispute resolution

- Both were modelled on the same basic idea, principles and retained similar structures.
- Substantial distinctions appear on how the dispute resolution is achieved by each of them

Arbitration and Litigation in Roman law

- Conisderably different forms of dispute resolution
- Diversities → a reaction to something that was considered as disadvantage of litigation in relation to arbitration
- Diversities → result of coexistence, emerged as procedural improvements and changes
- Their relations should not be exclusively analyzed from perspective of similarities and analogies

Litigation

- exclusively adjudication
- excessive claims (*pluspetitio*)
- pecuniary claims had to be exact

Debt matters and valutation of damages

- if plaintiff was doubtful about **how much he could prove that he was owed**
- **he did not know exactly how much he was owed**
- in search for a means **to determine the amount of what was owed to him**

- ***iudex*** → a layman, not professional → not judge by modern standards
- *iudex* → fact finder limited in his powers

- ***arbiter*** → specialist, expert, a person close to the disputants
- *arbiter* → competent fact finder
- *arbitratus* → estimation, valutation, determination, expertise

Litigation:

- bipartite
- risky (*pluspetitio*) and not controlled by the parties in dispute
- exact pecuniary claims
- guided by formal procedures
- unpredictable duration
- adjudication

Arbitration:

- imitates the formality of court procedure
- parties go beyond constraints of ordinary jurisdiction
- controlled by the parties
- different (contractual) type of procedural risks
- decision not enforceable by the state
- decision did not exclusively consist in adjudication
- choice of language the parties understand

Arbitral procedure:

- time limited (*modicum tempus*), cautious schedule of hearing, single hearing
- oral → lessens the complexity and secrecy of a procedure dominated by writing
- confidential → exclusion of publicity

↓↓↓

not to expose secrets of the business transactions (*secreta negotii*) and the personal secrets of the disputing parties (*intima*). Ulp., D.36.3.5.1.

Question of procedural risk:

Arranging arbitration → supressing the risk of litigation → by subjecting the disputing parties to pure contractual risk

Editio actionis and *editio instrumentorum* – The Limits on the Introduction of New Facts and Evidence in Roman Law

DOC. DR. SC. TOMISLAV KARLOVIĆ
FACULTY OF LAW, UNIVERSITY OF ZAGREB

Introduction of New Facts and Evidence

- *Beneficium novorum* – new facts and evidence filed to the court after the completion of stage during which they should have been presented
- *Nova reperta* – new facts
- *Nova producta* – new evidence
- *Dies ad quem?* ⇒ PRECLUSION? 
- efficiency of the proceedings vs. right to be heard/duty to establish the truth

Croatia

HRVATSKA GOSPODARSKA KOMORA
CROATIAN CHAMBER OF ECONOMY

CIVIL PROCEDURE ACT 2013

Art. 299 (1) Each party shall, in the complaint and the answer to the complaint, at the latest at the preparatory hearing, state all the facts necessary to substantiate his/her motions, offer evidence necessary to establish his/her allegations and declare his/her position about the allegations and evidence offered by the opposing party.

(2) During the main hearing the parties may present new facts and offer new evidence, only if they could not state them before without their fault.

(3) New facts and new evidence presented during the main hearing in violation of sec. 2 of this article shall not be taken into consideration by the court.

ARBITRATION ACT 2001

Art. 24 (Default of a party) Unless otherwise agreed by the parties, if, without showing sufficient cause,

1) the claimant fails to communicate his statement of claim in accordance with Art. 22, para. 1 of this Law, the arbitral tribunal shall terminate the proceedings; 2) the respondent fails to communicate his statement of defense in accordance with Article 22, paragraph 1 of this Law, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

3) any party fails to appear at a hearing or to produce documentary evidence within the time limit provided for their production, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Croatia – LEGAL REMEDIES

CIVIL PROCEDURE ACT 2013

APPEAL – Art. 352: NO

REVISION – Art. 387: NO

New facts may not be presented

In a motion for revision parties may present new facts and offer new evidence only if they relate to substantial violation of civil procedure rules in respect of which a motion for revision may be filed.

RETRIAL – Art. 421.1: The proceedings that have been ended by a legally effective decision may be repeated on a motion of a party:

(10) if the party has learned about new facts or has been given or has gained a possibility to have recourse to new evidence on the basis of which a more favorable decision could have been made for the party had such facts or evidence been used in the previous proceedings.

ARBITRATION ACT 2001

APPLICATION FOR SETTING ASIDE – Art. 36:

(5) If the parties in a dispute expressly so agree in the arbitration agreement, an application against the arbitral award may also be made on the grounds that the party applying for setting aside found new facts or has the opportunity to present new evidence on the basis of which an award more favorable to him could have been made if these facts would have been known or evidence produced in the hearings that preceded the making of the challenged award. This ground could not

Retrial may be allowed on the grounds referred to in Article 421, Paragraph 1, subparagraphs 1, 7, 8, 9 and 10, and Paragraph 3 of this Act only if the party had not been able to present these grounds, through no fault of his/her own, before the previous proceedings were concluded with a legally effective court decision.

Permanent Arbitration Court of the Croatian Chamber of Commerce Arbitration Rules – ZAGREB RULES (2015)

Art. 42 (1) The arbitral tribunal decides on the admissibility, importance, significance and strength of the evidence proposed and heard and which party has the burden of proving certain factual assertions.

(2) The arbitral tribunal, if it finds it to be purposeful, may invite the parties to submit to the arbitral tribunal and the other party, within the time limit set by the arbitral tribunal, an overview of the documents and other evidence which that party intends to present in order to establish disputed facts presented in the action or in the reply to the statement of claim.

International rules

SWISS RULES 2012

AMENDMENTS TO THE CLAIM OR DEFENCE Art. 20:

1. During the course of the arbitral proceedings, a party may amend or supplement its claim or defence, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it, the prejudice to the other parties, or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

ICC ARBITRATION RULES

APPENDIX IV – CASE MANAGEMENT TECHNIQUES

The following are examples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and cost. …

d) Production of documentary evidence: (i) requiring the parties to produce with their submissions the documents on which they rely; (ii) avoiding requests for document production when appropriate in order to control time and cost; (iii) in those cases where requests for document production are considered appropriate, limiting such requests to documents or categories of documents that are relevant and material to the outcome of the case; (iv) establishing reasonable time limits for the production of documents; (v) using a schedule of document production to facilitate the resolution of issues in relation to the production of documents.

International rules

VIENNA RULES 2013

CONDUCT OF THE ARBITRATION Art. 28

(1) The arbitral tribunal shall conduct the arbitration in accordance with the Vienna Rules and the agreement of the parties but otherwise in the manner it deems appropriate. The arbitral tribunal shall treat the parties fairly and shall grant the parties the right to be heard at every stage of the proceedings.

(2) **Subject to advance notice, the arbitral tribunal may *inter alia* declare that pleadings, the submission of evidence, and requests for the taking of evidence shall be admissible only up to a certain point in time of the proceedings.**

Relevance of Roman law experience

ROMAN LAW

2 stages of classical Roman procedure in general:

- *editio actionis et instrumentorum*?

1. *In iure* – preliminary, informal hearing

- *editio actionis et instrumentorum*?

- *litis contestatio*

2. *Apud iudicem* - state sanctioned arbitration by *iudex* or *arbiter*

CONTEMPORARY (CROATIAN) LAW

2 stages - relevant facts and evidence:

1. preliminary hearing (art. 286 – 293 CPA)

- general preclusion, exceptionally new facts and evidence

2. main hearing

Editio actionis

D. 2.13.1 (*ULPIANUS LIBRO QUARTO AD EDICTUM*)

pr. *Qua quisque actione agere volet, eam edere debet: nam aequissimum videtur eum qui acturus est edere actionem, ut proinde sciat reus, utrum cedere an contendere ultra debeat, et, si contendendum putat, veniat instructus ad agendum cognita actione qua conveniatur.*

1. Edere est etiam copiam describendi facere: vel in libello complecti et dare: vel dictare. Eum quoque edere Labeo ait, qui producat adversarium suum ad album et demonstret quod dictaturus est vel id dicendo, quo uti velit.

TRANS. WATSON

Pr. Where anyone wishes to bring an action, he should give notice; for it seems most fair that one who is about to bring an action should give notice so that the defendant accordingly may know whether he ought to admit the claim or contest it further and so that if he thinks it should be contested, he may come prepared for the suit, knowing the action by which he is sued.

1. To give notice includes providing the means for taking a copy, the drawing up and furnishing of a written statement or dictation. Labeo says that a person also gives notice if he brings his adversary to the tablets proclaiming the edict and points out the action which he is about to dictate or declares the one which he intends to use.

Editio instrumentorum

D. 2.13.1 (*ULPIANUS LIBRO QUARTO AD EDICTUM*)

2. *Editiones sine die et consule fieri debent, ne quid excogitetur edito die et consule et praelato die fiat. Diem autem et consulem excepit praetor quo instrumentum conscriptum est, non in quem solutio concepta est: nam dies solutionis sicuti summa pars est stipulationis. Rationes tamen cum die et consule edi debent, quoniam accepta et data non alias possunt apparere, nisi dies et consul fuerit editus.*

3. Edenda sunt omnia, quae quis apud iudicem editurus est: non tamen ut et instrumenta, quibus quis usurus non est, compellatur edere.

TRANS. WATSON

2. Announcements should be made without specification of day and consul; this is to prevent a contrivance by which an announcement bearing day and consul is made and then something is done prior to that date. Moreover, the praetor refers to the day on which and the consul under whom the instrument has been executed and not to the date at which it determines payment to be made. For the day of payment is almost the most important part of a stipulation. Yet accounts ought to be produced bearing day and consul since otherwise, without such data, it could not appear what had been received and expended.

3. A person ought to produce everything which he intends to produce before the judge. Yet he is not compelled to produce the documents which he does not intend to use.

Editio actionis and *editio instrumentorum* in Roman law

1. *EDITIO ACTIONIS* IN TWO PARTS –

A) WLASSAK (1889)

- two times *in iure* before *praetor* – first time to start the proceedings before the *praetor* and second time in the form of *litis contestatio*


DIE
LITISKONTESTATION
IM
FORMULARPROZESS.
VON
MORIZ WLASSAK.
LEIPZIG.

B) LENEL (1894)

extra-procedural act informing the defendant about the nature of the impending lawsuit, and a continuous process in procedure before *praetor* ending with *litis contestatio*

„in der That ist der Kläger von Beginn bis zu Ende des Verfahrens in iure in einem beständigen edere begriffen", *Die Form der Litiskontestation im Formularprozeß*, ZSS RA 28 (1894), 388.

Editio actionis and *editio instrumentorum* in Roman law

2. *EDITIO ACTIONIS* – UNITARY, INFORMAL ACT MADE *IN IURE*

- LEMOSSE – *editio* at the beginning of *in iure* procedure, otherwise there was no place for the introduction of new lawsuits by praetor in *edicta repentina* or the creation of *actiones in factum*
- („Editio actionis" et procédure formulaire, LABEO XXI (1975), 46 ff.)
-
- BÜRGE – continuous exchange between parties of requests and informations regarding the lawsuit and evidence with strong inclusion of lawyers, before and in the *in iure* phase
- (Zum Edikt *De edendo*, ZSS RA 112 (1995), 112 ff.)

Editio – to bring an action or file a suit

C. 2.1.3 (Imperatores Severus, Antoninus)

*Edita actio speciem futurae litis demonstrat, quam emendari vel mutari licet, prout edicti perpetui monet auctoritas vel ius reddentis decernit aequitas. (*A.D. 202)

C. 2.1.3 (Imperatores Severus, Antoninus)

The form of action exhibited (to defendant) shows the kind of action intended to be tried, and may be amended or changed, according as the authority of the perpetual edict permits, or the sense of justice of the judge decrees.

C. 3.9.1 (Imperatores Severus, Antoninus)

Res in iudicium deducta non videtur, si tantum postulatio simplex celebrata sit vel actionis species ante iudicium reo cognita. Inter litem enim contestatam et editam actionem permultum interest. Lis enim tunc videtur contestata, cum iudex per narrationem negotii causam audire coeperit. (A.D. 202)

C. 3.9.1 (Imperatores Severus, Antoninus)

A matter is not fully in court if a mere request for summons has been made, or the defendant has been made acquainted, before trial, with the kind of action which is brought. For there is a great difference between joinder of issue and exhibiting the action which is brought. For the issues appear to be joined only when the judge has commenced to hear the cause by listening to the statement of facts.

Editio instrumentorum

– accessory nature; information to the defendent of the proposed evidence held by the plaintiff

- in general not regulated; defendant not obliged to produce evidence

- *instrumenta* – only written or?

➢22.4 *De fide instrumentorum et amissione eorum*

➢D. 22.4.1 (Paulus libro secundo sententiarum) *Instrumentorum nomine ea omnia accipienda sunt, quibus causa instrui potest: et ideo tam testimonia quam personae instrumentorum loco habentur.*

➢„Instruments" include all evidence relevant to a case. Hence, both oral evidence and witnesses are regarded as instruments.

D. 22.5.2 (Modestinus 8 regul.) The value of testimony depends on the dignity, faith, morals, and gravity of witnesses. Hence, those who depart from their previous *testatio* (written deposition as part of *editio*?) are not to be listened to.

Editio instrumentorum by *argentarius*

- duty for *argentarius* to exhibit accounts (*rationes*) – punishable by actio

D. 2.13.4 (*Ulpianus libro quarto ad edictum*) pr. *Praetor ait: "argentariae mensae exercitores rationem, quae ad se pertinet, edent adiecto die et consule".* 1. *Huius edicti ratio aequissima est: nam cum singulorum rationes argentarii conficiant, aequum fuit id quod mei causa confecit meum quodammodo instrumentum mihi edi.*

➢Pr. The praetor says: „Let those who operate a banking business produce accounts in matters relating to their business with the days and consul added." 1. The reason for this edict is most equitable. For since bankers prepare the accounts of individuals, it was equitable that what he prepared on my account and the documents, which in a sense can be deemed to be mine, be produced to me.

D. 2.13.6 (Ulpianus libro quarto ad edictum) 4. *Ex hoc edicto in id quod interfuit actio competit:* … 7. *Edi autem est vel dictare vel tradere libellum vel codicem proferre.*

➢4. An action lies in accordance with this edict to the extent of person's interest.

➢7. Moreover, to produce is either to dictate or hand over a written statement or make available an account book.

Sanction for missing *editio*?

- *actio poenalis* – based on D. 2.13.1.5 (Ulpianus libro quarto ad edictum) Fernández Barreiro (*La previa información del adversario en el proceso privado romano*, 1969, 95 ff., 114)

D. 2.13.1.5 *Eis, qui ob aetatem vel rusticitatem vel ob sexum lapsi non ediderunt vel alia ex iusta causa, subvenietur.*

- preclusion after *litis contestatio* – generally accepted

- reflected in the difference between *iudicia stricti iuris* and *bonae fidei* concerning the exhaustiveness of *editio* (Babusiaux; *Id quod actum est,* 2006, 252-253)

- the problem of relationship between *editio* and *formula* – *formula* does not contain indication of evidence!

Conclusion

- *editio actionis* and *editio instrumentorum* – first act in commencing the proceedings, even before appearing before the *praetor*
- to prepare the parties for swift conclusion of the meeting before praetor and faster preparation of formula (most often transcription of initially edited *formula actionis*)
- all evidence to be edited – building of the case before appearing at the magistrate's court
- preclusion of new evidence – not substantiated by the sources, but indicated by the words of the edict on the duty of *editio*
  - connected with the finality of *litis contestatio* – no change to the *formula* – evidence

Pravni Fakultet | Sveučilište u Zagrebu

Thank you!

TKARLOVI@PRAVO.HR

Award on Agreed Terms – a Likely Cause of Disagreements

Prof. Dr. Aleš Galič

University of Ljubljana, Faculty of Law

- **Pro and contra settlement**?
- Viewpoint of the parties / **arbitrators** / **arbitral institutions** / justice system
- **Two options in arbitration**
- Settlement agreement ⇨ termination of proceedings
- Joint proposal of the parties ⇨ Award on agreed terms (Consent award, award by consent),

Arbitration Act (SLO): Art. 34

- If, **during arbitral proceedings**, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings. If requested by the parties, the **settlement shall be recorded** in the form of an arbitral award on agreed terms, **except if the content of the settlement is in conflict with the public policy** of the Republic of Slovenia.
- An award on agreed terms shall ….state that it is an award. Such an award has the **same effect as any other award** on the merits of the case.
- **UNCITRAL MODEL LAW** (Art. 30)

… and, if requested by the parties **and not objected to by the arbitral tribunal**, record the settlement…

Rules of the Ljubljana Arbitration Centre (Art. 43)

- If, **before the final award is made**, the parties agree on a settlement of the dispute, the Arbitral Tribunal shall **either issue an order for the termination** of the proceedings or, if so requested by the parties **and accepted** by the Tribunal, record the settlement in the form of an **award on agreed terms**.

Are arbitrators bound by the parties' proposal to issue an award on agreed terms ?

- Pr
- **Gr**
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  no
  Proceedings on merits pending again?

Can arbitrators assist parties in reaching a settlement

- Only if requested by the parties?
  - with express consent (e.g. included in ToR), included in PO1 (which was not objected on that point)
  - with consent of the parties, but on the initiative of the arbitrators?
- without an express consent?
- Assistance to the parties v. independence and impartiality
- Different tools possible: e.g. drafting and orally presenting a preliminary draft of the award concerning points of law upon the joint request of the parties?

IBA Guidelines on Conflicts of Interest in International Arbitration (4d)

An arbitrator **may assist the parties in reaching a settlement**

….. However, before doing so, the arbitrator should receive an **express agreement** ….

Such express agreement shall be considered to be an **effective waiver of any potential conflict of interest** …. If the assistance by the arbitrator does not lead to final settlement of the case, the parties remain bound by their waiver.

However, ….., the arbitrator shall **resign** if, as a consequence of his or her involvement in the settlement process, the arbitrator **develops doubts** as to his or her ability to remain impartial or independent ….

Enforceability of awards on agreed terms

- The main difference between a contract and an award (on agreed terms), so ….
- Controversial issue: Does it matter whether there was still a genuine dispute in the moment when the matter was submitted to arbitration? Can an arbitral award on agreed terms be rendered based on settlement agreement reached (e.g. in mediation) even before the request for arbitration was filed?

Mediation Act (Slovenia)

Art. 14(2)

The parties may agree that the **settlement agreement is recorded** in the form of enforceable notarial deed, as a settlement in court or as an **arbitral award on agreed terms**

SCC Mediation Rules (2014)

- Article 14

In case of settlement, the parties may, subject to the consent of the Mediator, **agree to appoint the Mediator as an Arbitrator and request him/her to confirm the settlement agreement in an arbitral award**.

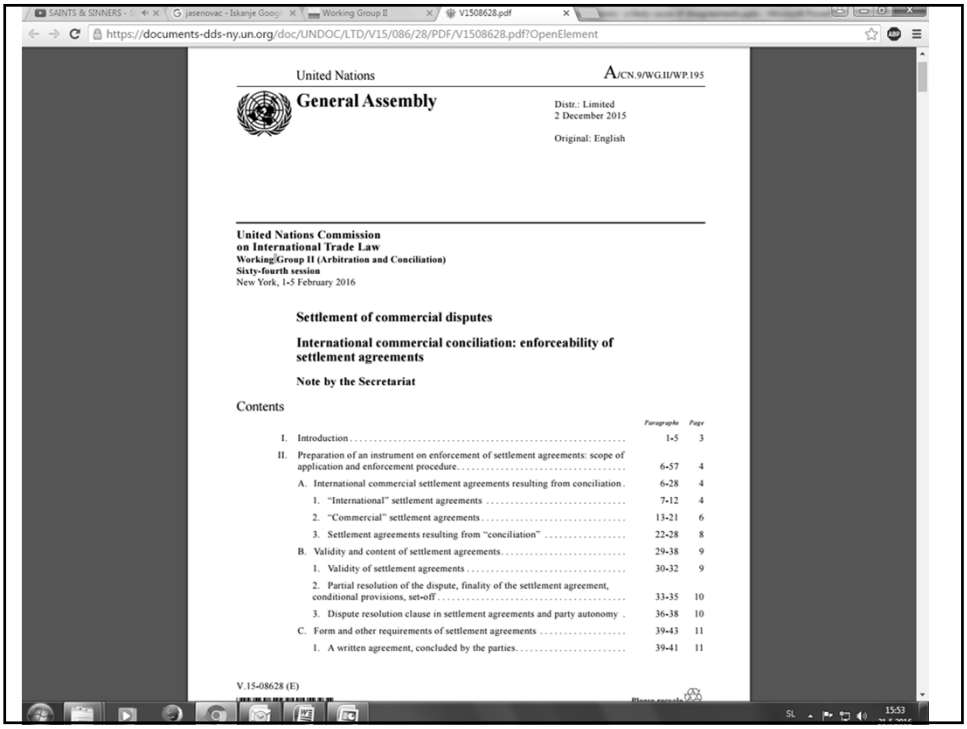
ARBITRATION INSTITUTE
OF THE STOCKHOLM CHAMBER OF COMMERCE

The New York Convention (Art. 1)

This Convention shall apply to the recognition and enforcement of arbitral awards [.....] and **arising out of differences between persons** …,

Slovenia: Arbitration Act (Art. 10)

"Arbitration agreement" is an agreement by the parties **to submit to arbitration all or certain disputes**



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United Nations A/CN.9/WG.II/WP.195

General Assembly

Distr.: Limited
2 December 2015

Original: English

United Nations Commission on International Trade Law
Working Group II (Arbitration and Conciliation)
Sixty-fourth session
New York, 1-5 February 2016

Settlement of commercial disputes

International commercial conciliation: enforceability of settlement agreements

Note by the Secretariat

Contents

V.15-08628 (E)

The content of an award on agreed terms

- Conditional settlement (**remains in force unless…., enters into force IF**….)?
- Interim award on liability on agreed terms ? (**share of contributory negligence**)?
- Clauses establishing procedural obligations relating to other pending proceedings (e.g. »accepts to withdraw a claim, pending in … court (or another arbitration)? **Prozessvertrag v. Konventionalprozess**
- Can it regulate issues not covered by the arbitration agreement?
- Can third parties join, alhough not bound by the arbitration agreement?
- Should it determine the law applicable to the merits of the dispute (of the settlement)?
- »**no admittance of liability**« clauses and their legal effects
- **Administrative costs and arbitrator's fees; allocation of costs**

Thank you for your attention!

1

PUBLIC AND PRIVATE JUSTICE
June 23-27, 2016, Inter-university Centre Dubrovnik

The Worst of Both Worlds?

How European Union Conceives „Arbitration" before an „International Court" under TTIP Draft Treaty

Prof. Dr. Alan Uzelac
Faculty of Law, University of Zagreb

2

PUBLIC v. PRIVATE JUSTICE

THE PUBLIC STRIKES BACK!

3

Introduction – Investor-State Dispute Settlement (ISDS) as a Special Form of Arbitration

- **Arbitration options as protection of investors and stimulus that could boost international trade**
  - **Assumptions:**
    - Investor is a weaker party, when compared to state and state agencies
    - In international trade, investors arrives to a foreign environment, lack of knowledge and orientation (as opposed to the other side)
    - Possible bias of domestic bodies - courts and tribunals
    - Problem of developing countries: lack of separation of powers, judiciary is not always impartial and independent from the government
    - State can act in both ways, as equal party and as regulatory authority: options for the state to expropriate or nationalise the investment or pass the laws that render the investment worthless
    - "Regular" international trade arbitration not sufficient
    - History: First ISDS in BIT - 1959 bilateral trade agreement between Germany and Pakistan

<u>Solutions – treaties on the protection of investments</u>

1. Arbitration with special, asymmetric distribution of procedural rights under BITs (bilateral investment treaties)
2. Special arbitration facilities for the investment disputes (ICSID)

4

Introduction – Investor-State Dispute Settlement (ISDS) as a Special Form of Arbitration

- **Special features of investment arbitration**

→ No arbitration agreement necessary for the establishment of jurisdiction

→ The investor can regularly choose among several options (ad hoc arbitration; institutional arbitration; state litigation), state party may have or have not the same or comparable options;

→ Possibility of direct enforcement and autonomous review (no setting aside before national courts) under some instruments (ICSID).

→ Explosion of ISDS from 1990's:

5

Introduction – Investor-State Dispute Settlement (ISDS) as a Special Form of Arbitration

- **Special features**

→ No arbitration agr
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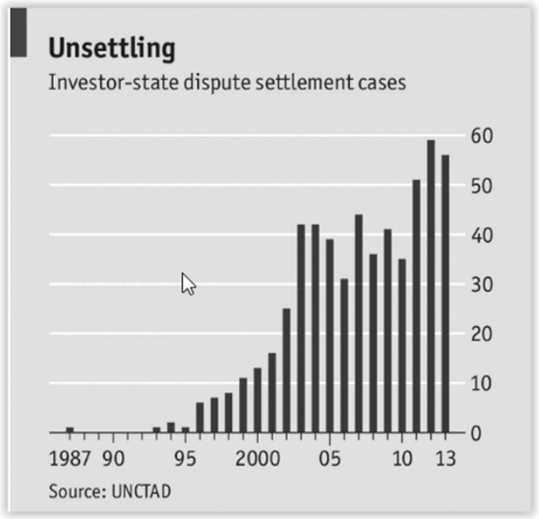
→ Explosion of ISDS



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Example: BIT Croatia-Austria (1999)

Article 9

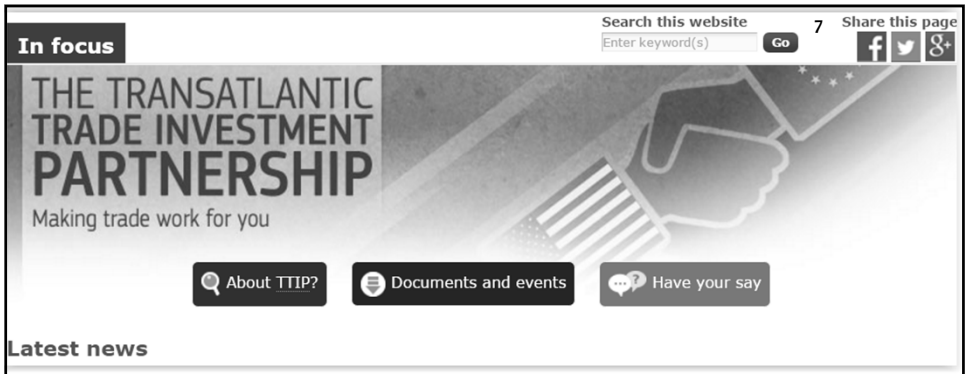
Settlement of Investment Disputes

(1) Any dispute arising out of an investment, between a Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably between the parties to the dispute.

(2) If a dispute according to paragraph 1 of this Article **cannot be settled within three months of a written notification of sufficiently detailed claims**, the dispute shall **upon the request of the Contracting Party or of the investor of the other Contracting Party be subject to the following procedures**:

a) to **conciliation or arbitration by the International Centre for Settlement of Investment Disputes,** established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature in Washington on 18 March 1965. In case of arbitration, each Contracting Party, by this Agreement irrevocably consents in advance, even in the absence of an individual arbitral agreement between the Contracting Party and the investor, to submit any such dispute to this Centre. This consent implies the renunciation of the requirement that the internal administrative or juridical remedies should be exhausted; or

b) to **arbitration by three arbitrators in accordance with the UNCITRAL arbitration rules,** as amended by the last amendment accepted by both Contracting Parties at the time of the request for initiation of the arbitration procedure. In case of arbitration, each Contracting Party, by this Agreement irrevocably consents in advance, even in the absence of an individual arbitral agreement between the Contracting Party and the investor, to submit any such dispute to the tribunal mentioned.



Trade and investment deal between the EU and the US

- Why?
  - Kickstarting economy; generate jobs and growth; cutting prices; influence world trade rules; project European values globaly
- Mandate to negotiate: June 2013 (European Commission)
- Participating in the process
  - The European Parliament & Governments (adoption of final draft text)
  - Business and trade unions; consumer, health and other public interest groups (consulted by the EC in the process)
- Until Feb 2016: 12 rounds of negotiation discussions

Trade and i

- Why?
  - Kickstar trade rul
- Mandate
- Participat
  - The Eurc
  - Business (consult
- Until toda

9


TTIP
STOP TTIP
EUROPEAN INITIATIVE
AGAINST TTIP AND CETA
ACT NOW! WHY? THE CAMPAIGN BLOG PRESS
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About Stop TTIP
EurActiv
SPECIAL REPORT | 8 - 12 December 2014
TTIP AND THE ARBITRATION CLAUSE
http://www.euractiv.com/sections/ttip-and-arbitration-clause
Contents
TTIP and arbitration: Juncker's birthday headache
On Tuesday (9 December) an estimated 60 "Stop TTIP" activists will give Commission President Jean-Claude Juncker a giant 60th
DON'T WORRY, THEY DON'T BITE!
TTIP
CETA
TISA

10


STOP TTIP
ACT NOW! WHY? THE CAMPAIGN PRESS CONTACT
Home » Europeans don't want investor state dispute settlement in trade agreements
EUROPEANS DON'T WANT INVESTOR STATE DISPUTE SETTLEMENT IN TRADE AGREEMENTS
The European Commission today released the results of a public consultation on the investor state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP). Between 27 March and 13 July 2014, the Commission had invited citizens to comment on various aspects of ISDS and received a record number of nearly 150,000 responses. It emerged today that 97 per cent of responses oppose ISDS.
ISDS would give foreign investors the right to sue states in private arbitration courts for any actions that could damage their profit expectations. Investors have used similar agreements to sue states and demand millions, even billions of Euros in compensation. One example is the lawsuit of Swedish energy company Vattenfall against Germany for introducing environmental requirements for a coal fired power stations. Another example is Canadian gas and oil company Lone Pine suing against a fracking moratorium in the state of Quebec.
"Such cases show that ISDS can be used to undermine environmental standards, to prevent regulation or to pocket taxpayers' money. It's bad enough that some investment agreements already include ISDS. It should certainly not be included in any future trade and investment deals." demanded Karl Bär, a spokesperson of the Stop TTIP alliance.


HEINRICH BÖLL STIFTUNG
TTIP Series
Investor-state dispute settlement under TTIP – a risk for environmental regulation?
By Christiane Gerstetter and Nils Meyer-Ohlendorf

11

History of problems with ISDS cases

- **Myers, Chemtura and Ethyl Corp. cases (Canada)**
  - Canadian ban on export of toxic PCB waste (NAFTA, Myers won)
  - Canadian ban on import of MMT aditive for public health resons (NAFTA, repealing of the ban, paid 15 mil $ to Ethyl)
  - Canadian decision on terminating pesticide business (NAFTA, Chemtura lost)
- **Occidental case (Ecuador)**
  - 2012 decision of ICSID: award of $ 1.8 billion plus 600 mil. Interest due to annulment of contract with Occidental Petroleum (transfer to third persons, not fair and equitable)
- **Vattenfall case (Germany)**
  - Swedish operator of two nuclear plants in Germany demanded 3.7 billion € compensation after decision on shutdown of nuclear power
- **Philip Morris case (Australia)**
  - Philip Morris submitted ISDS under UNCITRAL Rules (challenge of Australian tobacco advertising restrictions
  - Australia announced in 2011 that it would not further support ISDS clauses (later withdrawn)
- **APOTEX case (USA)**
  - Canadian pharma alleged that US courts misinterpreted federal law in violation of NAFTA when ruling in favor of Pfizer (substantive denial of justice by a manifestly unjust domestic legal decision, US government won).
- **Other countries: BRAZIL (no ISDS), South Africa (considering withdrawal), India (considering withdrawal), Indonesia (will let BITs lapse)**

12

ISDS in Transatlantic Trade and Investment Partnership (TTIP) – evolution of positions

- **EU Concept paper (May 2015)**
  - "Investment in TTIP and beyond – the path for reform"
- Main ambition: ***to move away from the concept of current ad hoc arbitration and move towards an 'Investment Court'***

WHY?

- Right to regulate
- ISDS should not affect the ability to pursue public policy objectives

HOW?

- Prohibition of forum shopping and parallel proceedings
- Full and mandatory transparency, code of ethical conduct
- Uniform cost rules
- Appeal options: "review of ISDS decisions through an appellate mechanism"

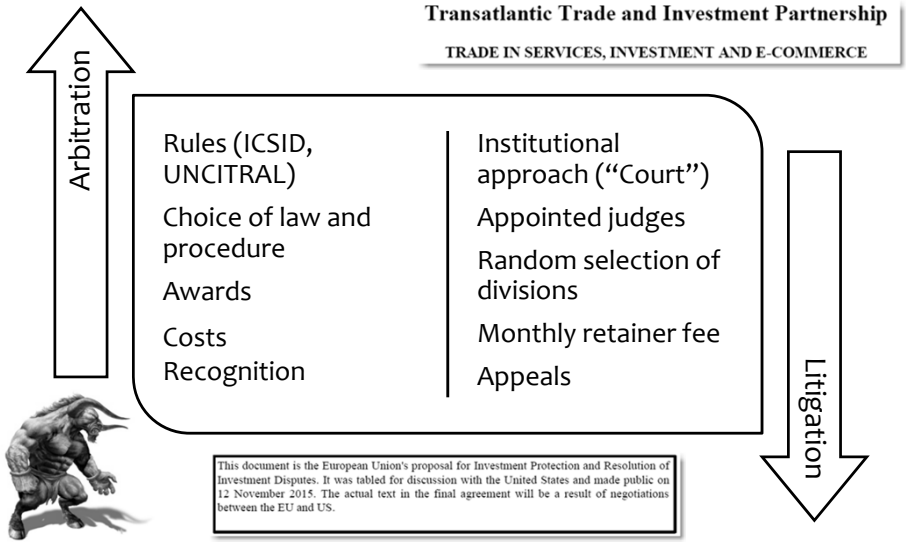
13

ISDS in Transatlantic Trade and Investment Partnership (TTIP) – evolution of positions

- **EU Textual Proposal (November 2015)**
- Proposed set of rules regarding investment protection and resolution of investment disputes
- **Chapters:**
  - **ADR and Consultations**
    - Amicable resolution, mediation, consultations
  - **„Submission of a Claim and Conditions Precedent"**
    - Request for determination of the respondent
    - Submission of a claim
    - Consent, Third party funding
  - **Investment Court System**
    - Tribunal of First Instance
    - Appeal Tribunal
    - Ethics
  - **Conduct of the Proceedings**

14

DR Crossbreed: ISDS as a new Minotaur



15

Borders of autonomy: comparison with arbitration

- Arbitration:
  - Arbitration agreement as cornerstone of every arbitration.
  - Free selection of
    - Place
    - Language
    - Applicable rules of law
    - Number and persons of arbitrators
    - Arbitration procedure.
  - Flexible and autonomous organization of the process.
  - No appeal.

- TTIP ISDS draft:
  - NO DISPUTE RESOLUTION AGREEMENT!
  - PLACE: VERY LITTLE AUTONOMY (place of consultations, 4/4a) - ???
  - LANGUAGE: NO MENTION (reference to rules of procedure)
  - NO FREEDOM IN SELECTING ADJUDICATORS (exception: number)
  - LIMITED AUTONOMY IN SHAPING THE PROCEDURE
  - RELATIVELY ELABORATED RULES, MANDATORY FOR THE PARTIES
  - APPEAL OPTION AS A STANDARD PART OF THE PROCEDURE.

16

Borders of administrative excellence: comparison with litigation

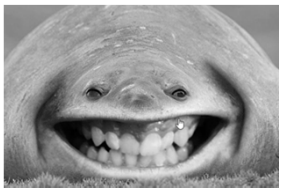
- Court litigation:
  - Pre-existent structure (established by law)
  - Professional adjudicators, readily available
  - Specialization for case management and dispute resolution
  - Administrative support provided internally
  - Elaborate and universal rules of procedure
  - Low costs of the process (salaries of the judges)

- TTIP ISDS draft:
  - NO PRE-EXISTENT STRUCTURE (NO "COURT" IN STRUCTURAL SENSE)
  - JUDGES AS RETAINED AMATEURS (???); A BIT MORE LUCRATIVE HONORARY OCCUPATION
  - LITTLE SPECIAL KNOWLEDGE ABOUT CASE MANAGEMENT
  - OUTSOURCING OF SECRETARIAL ASSISTANCE
  - "BORROWING" FROM OTHER (ARBITRAL) RULES
  - JUDGES BEING PAID AS ARBITRATORS (PLUS STAND-BY FEE)

17

NATURE OF THE PROCESS?

What sort of animal is TTIP ISDS?



18

LIRBITRATION/ARBIGATION?

- Moving from "international arbitration" to "international investment court", what is TTIP ISDS?
  - JUDGES acting under ARBITRAL RULES
  - Applicability of the 2014 UNCITRAL Rules of transparency in Treaty-based Investor-State **Arbitration**

2. A claim may be submitted to the Tribunal under one of the following sets of rules on dispute settlement:

(a) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID);

(b) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID) in accordance with the Rules on the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre, where the conditions for proceedings pursuant to paragraph (a) do not apply;

(c) the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL); or,

(d) any other rules agreed by the disputing parties at the request of the claimant. In the event that the claimant proposes a specific set of dispute settlement rules and if, within 30 days of receipt of the proposal, the disputing parties have not agreed in writing on such rules, or the respondent has not replied to the claimant, the claimant may submit a claim under one of the set of rules provided for in paragraphs (a), (b) or (c);

19

QUALITY OF THE ADJUDICATORS?

Qualifications and capacity of the members of the TTIP Tribunals

20

Amateur judges or professional arbitrators?

- **"Judges" of TTIP "Tribunals" under TTIP EU proposal:**
  - Appointed for a fixed mandate, but remunerated as arbitrators
  - Paid to be available, but working only occasionally and part-time
  - Limited pool of potential adjudicators in the First Instance Tribunal (5+5+5) but selected based on random criteria
  - Knowledgeable in "international law", but selected based on their ignorance (key position: nationals of third countries)
    - Right to decline the mandate if feeling incompetent?
  - Mandate from/for the parties in the procedure or from the parties to the TTIP ("Committee")
    - What if the mandate expires in the course of the pending process?
  - "Private", highly ethical, with "independence beyond doubt" (*shall not be affiliated with any government*), but may also be state officials (?)
    - Challenge for "conflict of interest" (11/2)

[6] For greater certainty, this does not imply that persons who are government officials or receive an income from the government, but who are otherwise independent of the government, are ineligible.

21

Article 9

Tribunal of First Instance ('Tribunal')

1. A Tribunal of First Instance ('Tribunal') is hereby established to hear claims submitted pursuant to Article 6.

2. The […] Committee shall, upon the entry into force of this Agreement, appoint fifteen Judges to the Tribunal. Five of the Judges shall be nationals of a Member State of the European Union, five shall be nationals of the United States and five shall be nationals of third countries.

3. The […] Committee may decide to increase or to decrease the number of the Judges by multiples of three. Additional appointments shall be made on the same basis as provided for in paragraph 2.

4. The Judges shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements.

5. The Judges appointed pursuant to this Section shall be appointed for a six-year term, renewable once. However, the terms of seven of the fifteen persons appointed immediately after the entry into force of the Agreement, to be determined by lot, shall extend to nine years. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.

22

6. The Tribunal shall hear cases in divisions consisting of three Judges, of whom one shall be a national of a Member State of the European Union, one a national of the

United States and one a national of a third country. The division shall be chaired by the Judge who is a national of a third country.

7. Within 90 days of the submission of a claim pursuant to Article 6, the President of the Tribunal shall appoint the Judges composing the division of the Tribunal hearing the case on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Judges to serve.

8. The President and Vice-President of the Tribunal shall be responsible for organisational issues and will be appointed for a two-year term and shall be drawn by lot from among the Judges who are nationals of third countries. They shall serve on the basis of a rotation drawn by lot by the Chair of the [..] Committee. The Vice-President shall replace the President when the President is unavailable.

23

INTERNATIONAL COURT WITHOUT ITS OWN ORGANISATIONAL SUPPORT?

Para-litigation tribunals with an AD HOC structure

24

Less than "administered arbitration"…

10. The Tribunal shall draw up its own working procedures.

11. The Judges shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities under this Agreement.

12. In order to ensure their availability, the Judges shall be paid a monthly retainer fee to be fixed by decision of the […] Committee. [Note: the retainer fee suggested by the EU would be around 1/3rd of the retainer fee for WTO Appellate Body members (i.e. around € 2,000 per month)]. The President of the Tribunal and, where applicable, the Vice-President, shall receive a fee equivalent to the fee determined pursuant to Article 10(12) for each day worked in fulfilling the functions of President of the Tribunal pursuant to this Section.

16. The Secretariat of [ICSID/the Permanent Court of Arbitration] shall act as Secretariat for the Tribunal and provide it with appropriate support. The expenses for such support shall be met by the Parties to the Agreement equally.

25

EMBRACING THE LEAST BELOVED PART

Regular appeal as an element of the ISDS procedure

26

ISDS and appeals: two incompatible notions?

- **ARBITRATION DOES NOT LIKE APPEALS!**
  - Conceptual discrepancy: layers of "confidence"
  - Pragmatic considerations
    - Efficiency and time-concerns: need for fast finality
    - Increased costs
  - Concept of limited control by the state judiciary – setting aside and recognition/enforcement proceedings
- Law and practice of arbitration today: **appeals generally permitted as an autonomous option agreed by the parties, but in real life almost entirely absent.**
  - Few exceptions: commodity trade arbitrations; WTO (?)

27

"Appeals" against the TTIP "awards"

Article 10

Appeal Tribunal

1. A permanent Appeal Tribunal is hereby established to hear appeals from the awards issued by the Tribunal.

2. The Appeal Tribunal shall be composed of six Members, of whom two shall be nationals of a Member State of the European Union, two shall be nationals of the United States and two shall be nationals of third countries.

3. The […] Committee, shall, upon the entry into force of this Agreement, appoint the members of the Appeal Tribunal. For this purpose, each Party shall propose three candidates, two of which may be nationals of that Party and one shall be a non-national, for the […] Committee to thereafter jointly appoint the Members.

4. The Committee may agree to increase the number of the Members of the Appeal Tribunal by multiples of three. Additional appointments shall be made on the same basis as provided for in paragraph 3.

5. The Appeal Tribunal Members shall be appointed for a six-year term, renewable once. However, the terms of three of the six persons appointed immediately after the entry into force of the agreement, to be determined by lot, shall extend to nine years. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.

28

"Appeals" against the TTIP "awards"

6. The Appeal Tribunal shall have a President and Vice-President responsible for organisational issues, who shall be selected by lot for a two-year term and shall be selected from among the Members who are nationals of third countries. They shall serve on the basis of a rotation drawn by lot by the Chair of the [..] Committee. The Vice-President shall replace the President when the President is unavailable.

7. The Members of the Appeal Tribunal shall possess the qualifications required in their respective countries for appointment to the highest judicial offices, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements.

8. The Appeal Tribunal shall hear appeals in divisions consisting of three Members, of whom one shall be a national of a Member State of the European Union, one a national of the United States and one a national of a third country. The division shall be chaired by the Member who is a national of a third country.

29

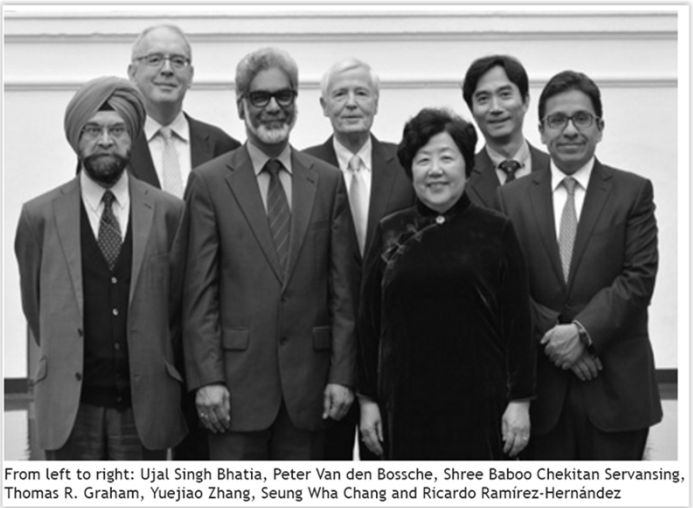
PROs and CONs of appeals in ISDS context

PROs	CONs

• Possibility to correct errors
  • More correct decisions (?)
• Enhancing predictability
  • Uniform application of law
• Securing legitimacy
  • Guarantee of public policy control (?)
  • Security against partiality and bias of arbitrators (?)
	• Lack of efficiency
	• Time-consuming process – length of proceedings
	• Increased costs of proceedings
	• Limitation on party autonomy
	• Concerns regarding fairness of the procedural design

30

Role model: WTO Apellate Body



From left to right: Ujal Singh Bhatia, Peter Van den Bossche, Shree Baboo Chekitan Servansing, Thomas R. Graham, Yuejiao Zhang, Seung Wha Chang and Ricardo Ramírez-Hernández

31

Grounds for appeal and procedure

1. Either disputing party may appeal before the Appeal Tribunal a provisional award, within 90 days of its issuance. The grounds for appeal are:

   (a) that the Tribunal has erred in the interpretation or application of the applicable law;
   (b) that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; or,
   (c) those provided for in Article 52 of the ICSID Convention, in so far as they are not covered by (a) and (b).

2. If the Appeal Tribunal rejects the appeal, the provisional award shall become final. The Appeal Tribunal may also dismiss the appeal on an expedited basis where it is clear that the appeal is manifestly unfounded, in which case the provisional award shall become final. If the appeal is well founded, the Appeal Tribunal shall modify or reverse the legal findings and conclusions in the provisional award in whole or part. Its decision shall specify precisely how it has modified or reversed the relevant findings and conclusions of the Tribunal.

3. As a general rule, the appeal proceedings shall not exceed 180 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appeal Tribunal issues its decision. When the Appeal Tribunal considers that it cannot issue its decision within 180 days, it shall inform the disputing parties in writing of the reasons for the delay together with an estimate of the period within which it will issue its decision. In no case should the proceedings exceed 270 days.

32

ENFORCING DECISIONS OF THE „INVESTMENT COURT"

Awards or judgments? Rules for recognition or enforcement of judicial or arbitral decisions?

33

Another sitting between two stools...

2. Each Party shall recognize an award rendered pursuant to this Agreement as binding and enforce the pecuniary obligation within its territory as if it were a final judgement of a court in that Party.

but...

3. Execution of the award shall be governed by the laws concerning the execution of judgments or awards in force where such execution is sought.

and...

5. For the purposes of Article 1 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, final awards issued pursuant to this Section shall be deemed to be arbitral awards and to relate to claims arising out of a commercial relationship or transaction.

34

Another sitting between two stools...

35

OTHER INTERESTING PROPOSALS: THE COSTS

Putting cap on costs of legal representation?

36

Keeping the costs low, or "social justice" in cost awards?

3. The Tribunal may not award punitive damages.

4. The Tribunal shall order that the costs of the proceedings be borne by the unsuccessful disputing party. In exceptional circumstances, the Tribunal may apportion such costs between the disputing parties if it determines that apportionment is appropriate in the circumstance of the case. Other reasonable costs, including the reasonable costs of legal representation and assistance, shall be borne by the unsuccessful disputing party, unless the Tribunal determines that such apportionment is unreasonable in the circumstances of the case. Where only some parts of the claims have been successful the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims. The Appeal Tribunal shall deal with costs in accordance with this article.

5. No later than one year after the entry into force of this Agreement, the […] Committee shall adopt supplemental rules on fees for the purpose of determining the maximum amount of costs of legal representation and assistance that may be borne by an unsuccessful claimant which is a natural person or a small or medium-sized enterprise. Such supplemental rules shall, in particular, take into account the financial resources of such claimants and the amounts of compensation sought.

37

Conclusion

Basic elements of 'new approach'

- Rejection of the conventional ISDS mechanisms
- Hostility to arbitration (with good reason?)
- Moving from party autonomy (arbitration) to public policy control and mandatory institutional setting (international investment court) – but on the platform of public international law
- Weird result: bastardic creature with multiple flaws

"Broadest support from businesses" for appellate review?

- Very fuzzy impression about possible impact on efficiency, length and costs of such proceedings
- Naïve trust in regulation of time limits of (full) appellate review
- Is it really attractive for potential investors?

IGNORANCE, DIPLOMACY OR PERFIDITY?

- **Are the authors of the proposal aware that this bird is never going to fly? Do they wish to abandon it, or to make it useless?**

38

How legal scholars study the EU TTIP-ISDS Proposals (experience of ELI-UNIDROIT SIG)

THANK YOU FOR YOUR ATTENTION!

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LIABILITIES OF JUDGES AND ARBITRATORS COMPARED

11th PPJ 2016

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INITIAL STATEMENTS & QUESTIONS

- Both judges and arbitrators perfom the same function – they settle disputes based on considerations of justice and equity - two sides of the same coin
- Arbitrators act as judges – they assume a judicial function (award=court judgement)
- Judges cannot be held liable for the manner in which they perform their judicial function
- Should arbitrators benefit from protection similar to that enjoyed by judges?
- It appears that legal systems approach the conception of immunity of arbitrators differently – this still presents very controversial issue! (the US – full immunity, limited imuunity, not precluding liability, no clear position, the UNCITRAL Model Law does not address the question of immunity)

APPROACHES

- Australia – arbitrators are not liable for negligence in respect of anything done in their capacity, but they can be liable for fraud
- Austria – there is a contract between the arbitrator and the parties. Supreme Court rulling of June 6, 2005. – damages can only be claimed from arbitrators if their conduct gives a rise to claim for setting aside the award (and the award has been set aside)
- England – an arbitrator is not liable for anything done or omitted…unless the act or omission is shown to have been in bad faith.
- Finland – arbitrators are contractually bound to provide effective services – any mistake may lead to liability
- France – full liability with a condition – claims are admissible only if there is no other legal remedy against the award

APPROACHES

- Netherlands – contractual relationship – in case of serious carelessness the arbitrators may be held liable
- Italy – arbitrators are liable to the parties e.g. because of refusal to act as arbitrator without reason, for failure to grant the award on time (fraud, gross negligence)
- Spain – arbitrators are liable for damages caused by misconduct, criminal liability is also established
- Switzerland – contractual relationship – liability in case of breach of duties (treating the matter fairly and within the reasonable time)
- USA – absolute immunity from civil liability – same like judges

A CONTRACT BETWEEN THE ARBITRATORS AND THE PARTIES ?

- Many authors support the doctrine of contractual approach – this means that the arbitrators are not only judges but that they are a kind of service providers
- This would lead to the conclusion that the status of arbitrators is essentially contractual – the source of their status is contractual – consequences
- Arbitrators accept their appointment in return for remuneration, the parties empower arbitrators to settle their dispute
- The problem remains with identifiying the exact nature of the contract – where to put it? (agency, mandate, provision of services, *sui generis*)

A CONTRACT BETWEEN THE ARBITRATORS AND THE PARTIES ?

- The doctrine of contractual approach should be open to doubt
- Is there a contract, albeit there is not legal document that sets the rights and obligations ?
- Legal relationship affected with numerous rules of public policy origin, general principles of law, rules of arbitral institutions etc. – distinctly different perception of arbitrators' status
- Waiving certain liabilities can be easily considered unlawful

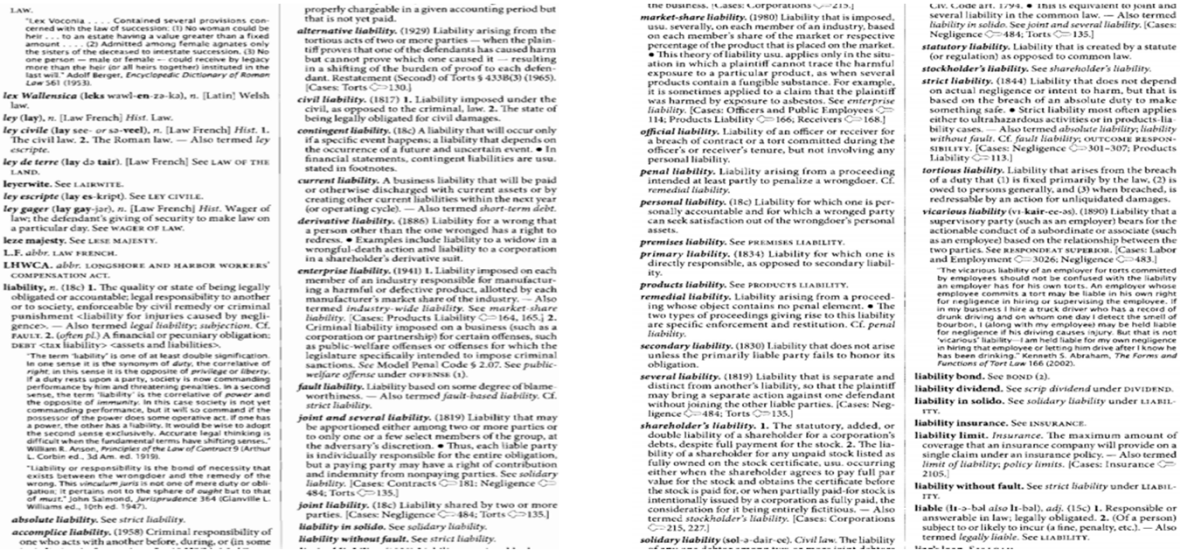
IMPARTIALITY

- One of the biggest concerns in nowadays world of arbitration especially with respect to the status of party appointed arbitrators
- *…an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator…(Ury v. Galeries Lafayette 1972.)*
- Most rules provide that arbitrators must be independent and impartial – this excludes any relation of dependece, particularly with the parties
- If an arbitrator fails to comply with the obligation to be impartial he may be subject to liability

DISCLOSURE, CONFIDENTIALITY REASONABLE TIME, DUE PROCESS

- Basic principles and rules – duties imposed by the legal rules
- To respect the confidentiality of the proceedings, to conduct the arbitration with due expeditiousness and to avoid any delay of the proceedings, to treat the parties equally etc.
- Are we talking about the duties that are imposed by the contract?

LIABILITY



law.

"Lex Voconia . . . Contained several provisions concerned with the law of succession: (1) No woman could be heir . . . to an estate having a value greater than a fixed amount . . . (2) Admitted among female agnates only the sisters of the deceased to intestate succession. (3) No one person — male or female — could receive by legacy more than the heir (or all heirs together) instituted in the last will." Adolf Berger, *Encyclopedic Dictionary of Roman Law* 561 (1953).

lex Wallensica (**leks** wawl-**en**-za-ka), *n.* [Latin] Welsh law.

ley (**lay**), *n.* [Law French] *Hist.* Law.

ley civile (**lay** see- *or* sə-**veel**), *n.* [Law French] *Hist.* **1.** The civil law. **2.** The Roman law. — Also termed *lex escripte*.

ley de terre (**lay** də **tair**). [Law French] See LAW OF THE LAND.

leyerwite. See LAIRWITE.

ley escripte (**lay es**-kript). See LEY CIVILE.

ley gager (**lay gay**-jər), *n.* [Law French] *Hist.* Wager of law; the defendant's giving of security to make law on a particular day. See WAGER OF LAW.

leze majesty. See LESE MAJESTY.

L.F. *abbr.* LAW FRENCH.

LHWCA. *abbr.* LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT.

liability, *n.* (18c) **1.** The quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment <liability for injuries caused by negligence>. — Also termed *legal liability*; *subjection*. Cf. FAULT. **2.** (*often pl.*) A financial or pecuniary obligation; DEBT <tax liability> <assets and liabilities>.

"The term 'liability' is one of at least double signification. In one sense it is the synonym of *duty*, the correlative of *right*, in this sense it is the opposite of *privilege* or *liberty*. If a duty rests upon a party, society is now commanding perfomance by him and threatening penalties. In a second sense, the term 'liability' is the correlative of *power* and the opposite of *immunity*. In this case society is not yet commanding performance, but it will so command if the possessor of the power does some operative act. If one has a power, the other has a 'liability.' It would be wise to adopt the second sense exclusively. Accurate legal thinking is difficult when the fundamental terms have shifting senses." William R. Anson, *Principles of the Law of Contract* 9 (Arthur L. Corbin ed., 3d Am. ed. 1919).

"Liability or responsibility is the bond of necessity that exists between the wrongdoer and the remedy of the wrong. This *vinculum juris* is not one of mere duty or obligation; it pertains not to the sphere of *ought* but to that of *must*." John Salmond, *Jurisprudence* 364 (Glanville L. Williams ed., 10th ed. 1947).

absolute liability. See *strict liability*.

accomplice liability. (1958) Criminal responsibility of one who acts with another before, during, or (in some

properly chargeable in a given accounting period but that is not yet paid.

alternative liability. (1929) Liability arising from the tortious acts of two or more parties — when the plaintiff proves that one of the defendants has caused harm but cannot prove which one caused it — resulting in a shifting of the burden of proof to each defendant. Restatement (Second) of Torts § 433B(3) (1965). [Cases: Torts ⟨⟩130.]

civil liability. (1817) **1.** Liability imposed under the civil, as opposed to the criminal, law. **2.** The state of being legally obligated for civil damages.

contingent liability. (18c) A liability that will occur only if a specific event happens; a liability that depends on the occurrence of a future and uncertain event. • In financial statements, contingent liabilities are usu. stated in footnotes.

current liability. A business liability that will be paid or otherwise discharged with current assets or by creating other current liabilities within the next year (or operating cycle). — Also termed *short-term debt*.

derivative liability. (1886) Liability for a wrong that a person other than the one wronged has a right to redress. • Examples include liability to a widow in a wrongful-death action and liability to a corporation in a shareholder's derivative suit.

enterprise liability. (1941) **1.** Liability imposed on each member of an industry responsible for manufacturing a harmful or defective product, allotted by each manufacturer's market share of the industry. — Also termed *industry-wide liability*. See *market-share liability*. [Cases: Products Liability ⟨⟩164, 165.] **2.** Criminal liability imposed on a business (such as a corporation or partnership) for certain offenses, such as public-welfare offenses or offenses for which the legislature specifically intended to impose criminal sanctions. *See* Model Penal Code § 2.07. See *public-welfare offense* under OFFENSE (1).

fault liability. Liability based on some degree of blameworthiness. — Also termed *fault-based liability*. Cf. *strict liability*.

joint and several liability. (1819) Liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion. • Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from nonpaying parties. See *solidary liability*. [Cases: Contracts ⟨⟩181; Negligence ⟨⟩484; Torts ⟨⟩135.]

joint liability. (18c) Liability shared by two or more parties. [Cases: Negligence ⟨⟩484; Torts ⟨⟩135.]

liability in solido. See *solidary liability*.

liability without fault. See *strict liability*.

the business. [Cases: Corporations ⟨⟩213.]

market-share liability. (1980) Liability that is imposed, usu. severally, on each member of an industry, based on each member's share of the market or respective percentage of the product that is placed on the market. • This theory of liability usu. applies only in the situation in which a plaintiff cannot trace the harmful exposure to a particular product, as when several products contain a fungible substance. For example, it is sometimes applied to a claim that the plaintiff was harmed by exposure to asbestos. See *enterprise liability*. [Cases: Officers and Public Employees ⟨⟩114; Products Liability ⟨⟩166; Receivers ⟨⟩168.]

official liability. Liability of an officer or receiver for a breach of contract or a tort committed during the officer's or receiver's tenure, but not involving any personal liability.

penal liability. Liability arising from a proceeding intended at least partly to penalize a wrongdoer. Cf. *remedial liability*.

personal liability. (18c) Liability for which one is personally accountable and for which a wronged party can seek satisfaction out of the wrongdoer's personal assets.

premises liability. See PREMISES LIABILITY.

primary liability. (1834) Liability for which one is directly responsible, as opposed to secondary liability.

products liability. See PRODUCTS LIABILITY.

remedial liability. Liability arising from a proceeding whose object contains no penal element. • The two types of proceedings giving rise to this liability are specific enforcement and restitution. Cf. *penal liability*.

secondary liability. (1830) Liability that does not arise unless the primarily liable party fails to honor its obligation.

several liability. (1819) Liability that is separate and distinct from another's liability, so that the plaintiff may bring a separate action against one defendant without joining the other liable parties. [Cases: Negligence ⟨⟩484; Torts ⟨⟩135.]

shareholder's liability. **1.** The statutory, added, or double liability of a shareholder for a corporation's debts, despite full payment for the stock. **2.** The liability of a shareholder for any unpaid stock listed as fully owned on the stock certificate, usu. occurring either when the shareholder agrees to pay full par value for the stock and obtains the certificate before the stock is paid for, or when partially paid-for stock is intentionally issued by a corporation as fully paid, the consideration for it being entirely fictitious. — Also termed *stockholder's liability*. [Cases: Corporations ⟨⟩215, 227.]

solidary liability (**sol**-ə-dair-ee). *Civil law.* The liability

Civ. Code art. 1794. • This is equivalent to joint and several liability in the common law. — Also termed *liability in solido*. See *joint and several liability*. [Cases: Negligence ⟨⟩484; Torts ⟨⟩135.]

statutory liability. Liability that is created by a statute (or regulation) as opposed to common law.

stockholder's liability. See *shareholder's liability*.

strict liability. (1844) Liability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe. • Strict liability most often applies either to ultrahazardous activities or in products-liability cases. — Also termed *absolute liability*; *liability without fault*. Cf. *fault liability*; OUTCOME RESPONSIBILITY. [Cases: Negligence ⟨⟩301–307; Products Liability ⟨⟩113.]

tortious liability. Liability that arises from the breach of a duty that (1) is fixed primarily by the law, (2) is owed to persons generally, and (3) when breached, is redressable by an action for unliquidated damages.

vicarious liability (vi-**kair**-ee-əs). (1890) Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties. See RESPONDEAT SUPERIOR. [Cases: Labor and Employment ⟨⟩3026; Negligence ⟨⟩483.]

"The vicarious liability of an employer for torts committed by employees should not be confused with the liability an employer has for his own torts. An employer whose employee commits a tort may be liable in his own right for negligence in hiring or supervising the employee. If in my business I hire a truck driver who has a record of drunk driving and on whom one day I detect the smell of bourbon, I (along with my employee) may be held liable for negligence if his driving causes injury. But that is not 'vicarious' liability — I am held liable for my own negligence in hiring that employee or letting him drive after I know he has been drinking." Kenneth S. Abraham, *The Forms and Functions of Tort Law* 166 (2002).

liability bond. See BOND (2).

liability dividend. See *scrip dividend* under DIVIDEND.

liability in solido. See *solidary liability* under LIABILITY.

liability insurance. See INSURANCE.

liability limit. *Insurance.* The maximum amount of coverage that an insurance company will provide on a single claim under an insurance policy. — Also termed *limit of liability*; *policy limits*. [Cases: Insurance ⟨⟩2105.]

liability without fault. See *strict liability* under LIABILITY.

liable (**lı**-ə-bəl *also* **lı**-bəl), *adj.* (15c) **1.** Responsible or answerable in law; legally obligated. **2.** (Of a person) subject to or likely to incur (a fine, penalty, etc.). — Also termed *legally liable*. See LIABILITY.

LIABILITIES OF JUDGES AND ARBITRATORS COMPARED

- Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions. (16. / Basic Principles on the Independence of the Judiciary 1985.)
- A judge shall not be held responsible, taken into custody or punished for a given opinion or a vote cast in the course of judicial deliberation.
- They have immunity accordance with the law / no such rules on the liability of arbitrators in Croatian law

LIABILITIES COMPARED (CROATIA)

The Courts Act - The state is liable for damages caused to the parties, if those are caused by judicial malpractice. The state may recover the damages from a judge, only if the latter has caused the damage intentionally or as a result of gross negligence.	**Arbitrators assume no public office – they are private judges - therefore the state cannot incure liability under the Courts Act – the arbitrators could only incur liability in the event of gross fault or intentional wrongdoing**
The Criminal Code - criminal offenses against official duty – judicial officials definitely fall within the category of an official person according to the meaning of the terms used by the code	Same applies to arbitrators from November 2003 (Art. 291 of the CC) !
Disciplinary proceedings against judges – Law on the State Judiciary Council	N/A

CONCLUDING REMARKS

1. **Immunity is necessary to ensure that the arbitrators act independently and impartially – restricting the ability to limit liability is wrong !**
2. **This does not mean that arbitrators should be granted immunity to the fullest extent from claims against them, but that their liability needs to be limited to the extent of liability of judges (gross negligence & intentional wrongdoing)**
3. **The problem lies within the fact that national laws and jurisdictions sometimes accept the contractual analysis of the role of arbitrators rather than the judge immunity analogy**
4. **The first one is widely allowing claims against arbitrators – the consequence – retrogressive effect on efficiency of arbitration**

CONCLUDING REMARKS

5. In order to maintain arbitration attractive it is necessary to limit arbitrators' immunity to those of judges – extending arbitrators' liability leads to impairment of arbitration - i.e. same principles should be applied when determing the liabilites of judges and those of arbitrators
6. Neither judges neither arbitrators can do their job efficiently without immunity
7. Effective forms of preventative protection are already there – general principles of law, rules governign arbitrators' duties to disclose all cirmustances that can give a rise to about their independence and impartiality, conditions governing challenges of arbitrators etc.
8. Arbitrators draw their rights from the will of the parties, while judges perform judicial power in the name of the state when someone seeks court judgement
9. Since they perform the same activity – they should also enjoy the same immunity!
10. Two sides of the same coin!

LIABILITIES OF JUDGES AND ARBITRATORS COMPARED

PPJ 2016

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Translatio iudicii between arbitration and state court in Italy: a critical perspective

Eleventh Public and Private Justice Course and Conference

24 May 2016

Carolina Stefanetti

Università degli Studi di Milano

Introduction

The relevant scenario:

- Art. 817 c.p.c.: arbitrators' lack of jurisdiction;
- Art. 819 *ter* c.p.c.: arbitration objection before state courts.

The qualification of the arbitration phenomenon

The judicial nature theory

- Arbitration is a perfect *alter ego* to state court proceedings;
- the arbitral award has the same effect than the state court's decision;
- conflict between arbitration and state courts seen as a conflict of jurisdiction.

The private nature theory

- Merely contractual nature of the arbitration phenomenon;
- Cass., S.U., 3 August 2000, n. 527;
- the arbitral award has the same effect of a contract;
- conflict between arbitration and state courts seen as an issue related to the merits of the case (*i.e.* an issue regarding the validity of the arbitration agreement).

The new Italian Arbitration Law (2006)

- Art. 824 *bis* c.p.c.: arbitral award has the same effects of a judicial decision;
- Art. 819 *ter* c.p.c.: the conflict between state court and arbitration should be considered as the conflict between different Italian courts;
- Art. 819 *bis* c.p.c.: arbitrators have the same power to refer matters to the Constitutional Court as well as national courts.

Cass., *S.U.*, 25 October 2013, n. 24153

- Arbitration has a jurisdictional nature;
- a conflict of jurisdiction between an Italian state court and domestic arbitration is comparable to the conflict between different Italian courts;
- a conflict between an Italian state court and international arbitration is comparable to the conflict between Italian and foreign state courts.

Corte cost., 19 July 2013, n. 223

- *Translatio iudicii* between arbitration and state court proceedings is admissible under the Italian legal system;
- the act instituting the first proceedings keeps relevance if the arbitral tribunal or the court finds it lacks jurisdiction and the dispute should be brought, alternatively, before an arbitral tribunal or a state court.

Which is the relevance of the **interim measures** granted in relation to the first procedure?

Art. 818 c.p.c. and Art. 669 *quinquies* c.p.c.: interim measures are always granted by a state court even if the dispute should be brought before an arbitral tribunal;

Art. 669 *octies* and 669 *novies* c.p.c.: interim measures may be granted before the beginning of the dispute but, in some cases, they lose their effects if the dispute is not initiated within a certain time limit.

Which is the relevance of the **evidence** produced in the first procedure?

In the Italian legal system, the rules on the taking of evidence are much more strict before state courts than in arbitration proceedings as far as time limits and subjective and objective limits are concerned.

As a consequence, the matter is relevant only in the case the dispute should be transferred from an arbitral tribunal to a state court.

In that case, three solutions may be possible:

1. Give no relevance to the evidence produced during the arbitral proceedings;
2. give relevance to the evidence produced during the arbitral proceedings and give the state court complete discretion to evaluate it;
3. give the judge the power to infer some elements from the evidence produced in the arbitration proceedings, but prevent him to decide exclusively on the basis of those pieces of evidence.

Are the procedural **time limits**, provided for judicial proceedings binding when the the dispute is transferred before an arbitral tribunal after the dismissal of jurisdiction by a state court?

The Italian legal system does not provide any specific time limit for claims, objections and document production for arbitration proceedings

Translatio iudicii and **third parties intervention**

Italian legal system provides three types of third party intervention during state courts proceedings:

1. Intervening party requests protection towards all the other parties to the proceedings of one of his rights;
2. intervening party requests protection towards one or some parties to the proceedings of one of his rights;
3. Intervening party has an interest in supporting the reasoning of any party to the proceedings.

Art. 816 *quinquies* c.p.c. regulates the third party intervention in the arbitration procedure.

§1. a third party may join or be asked, by the parties to the proceedings, to join the procedure (in cases 1. and 2. we have seen before) only if that third party, the parties to the arbitration and the arbitral tribunal agree on that.

§2. intervention of a third party may be always permitted in case of compulsory joinder and in case of supporting intervention (case 3.).

Translatio iudicii and **counterclaims** that fall outside the scope of the arbitration agreement

- Parties may reach an arbitration agreement with reference to the counterclaim as well;
- what happens if parties are not able to reach that agreement?

Thank you!

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ARBITRATION

IS IT UNFAIR TO CONSUMERS?

NANCY SCHULTZ
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FOWLER SCHOOL OF LAW
CHAPMAN UNIVERSITY
MAY 2016

ARBITRATION IN THE US

- Evidentiary rules loosely applied; absence of jury simplifies process
- Parties can design their own procedure
  - Amount of permissible discovery
  - Form of witness testimony
  - Time limits
- Award is final and non-appealable (with very limited exceptions, such as corrupt arbitrator, fraud, oppression; "fundamentally unfair")

*Federal Arbitration Act (FAA) declares general enforceability of arbitration agreements; 9 U.S.C. §§ 1-14 (2012)

ARBITRATION V MEDIATION

- Mediation is facilitated communication (though evaluative mediation is possible); arbitration is litigation
- Mediation may result in agreement, but not decision; in the US, mediators are trained to fully resolve disputes; lawyers frequently prefer former judges or subject-matter experts
- Mediation is (generally) voluntary; and even if mandated, no obligation to reach agreement
- Why parties like mediation: control, they feel heard
- Med/Arb—hybrid; mediator becomes arbitrator

"AGREEMENTS" TO ARBITRATE

Very common in consumer contracts:

- Financial
- Healthcare
- Travel
- Employment
- Product sales

Historical suspicion of arbitration has been replaced with arguably excessive deference to these "agreements"; US Supreme Court has repeatedly come down firmly on the side of arbitration: *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (rejecting argument that class arbitration is necessary to vindicate low-value statutory claims when expert costs are higher than projected individual recovery); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, (2011) (holding that the FAA preempts California's state-law rule prohibiting class-waivers because the rule "interferes" with arbitration by requiring class arbitration or class litigation)

IN FINANCIAL CONSUMER CONTRACTS: I.E., CREDIT CARDS

- TENS OF MILLIONS OF CONSUMERS ARE SUBJECT TO ARBITRATION "AGREEMENTS"
- MORE THAN 50% OF CREDIT CARD LOANS OUTSTANDING (IT WOULD BE 94% BUT FOR THE SETTLEMENT OF AN ANTITRUST LAWSUIT IN 2009-2010)

*CFPB Report to Congress, March 2015

ADVANTAGES OF ARBITRATION

- Cheaper (general consensus on this, though numbers vary; American Arbitration Association (AAA) recently changed cost structure, and consumer costs seem consistently lower since)
- Quicker (average time for a civil case in federal court is about two years; average time for arbitration is 6-8 months)
- Less formal (or is it?—some commentators are concerned that discovery and evidentiary processes are becoming more like traditional litigation; Tracey B. Frisch, DEATH BY DISCOVERY, DELAY, AND DISEMPOWERMENT: LEGAL AUTHORITY FOR ARBITRATORS TO PROVIDE A COST-EFFECTIVE AND EXPEDITIOUS PROCESS,17 Cardozo J. Conflict Resol. 155 (2015)—suggesting that arbitrators must maintain control of the proceedings). In our adversarial system, it is very hard for litigators to forego opportunities for battle.)

EXPRESSED CONCERNS

- Contracts of adhesion (interestingly, business-to-business contracts are much less likely to include arbitration clauses)
- Damage to constitutional right to Article III judge?
- Preclude class actions (almost all consumer financial contracts preclude class actions; some lenders have said that this is why they insist on arbitration)
- Arbitrator bias?
  - Arbitrators get to decide validity of arbitration clauses
  - In 2009 the Minnesota Attorney General's office filed suit against the National Arbitration Forum (NAF)--the then leading debt collection arbitration forum. According to the allegations, the NAF purportedly held itself out as an impartial arbitration provider while having ties to key members of the debt collection industry. Within days, the NAF entered into a settlement with the Minnesota Attorney General that required it to cease arbitrating consumer debt collection cases.

CFPB STUDY

- Consumers obtained $172,433 in affirmative relief and $189,107 in debt forbearance in 32 of 341 decided cases filed with AAA in 2010 -11
- Federal courts approved 422 consumer financial class settlements 2008-12, providing $540 million to at least 34 million consumers PER YEAR; more than $2 billion in cash relief and $600 million in-kind relief; $1.1 billion cash paid or scheduled to be paid; doesn't include "behavioral" relief
- When companies filed arbitration claims, they received $2,806,662 in relief in 227 out of 244 cases filed

Plans to propose rule prohibiting class action waivers in arbitration agreements for consumer financial products

ANOTHER VIEW—ALSO FROM CFPB DATA

- About 60% of consumer financial products class actions ended in a non-class settlement or potential non-class settlement (i.e., withdrawal or dismissal by the plaintiff); approximately 12% (sixty-nine cases) reached an approved class-action settlement. This means that only a small portion of class actions that are filed result in any damages to the class-member consumer.
- Looking at a broader data set of consumer financial class-action settlements from 2008-2012, the average claims rate (claims made as a percentage of eligible class members) was low, 21%, with an 8% median. Thus, even when consumers obtain a settlement through the class device, they usually do not take the administrative steps to obtain the payout.
- The dispute resolution process matters little to consumers in product selection (at least for credit cards) and most consumers do not know if they can sue in court or are subject to mandatory pre-dispute arbitration agreements.

* Ramona L. Lampley, "UNDERDOG" ARBITRATION: A PLAN FOR TRANSPARENCY, 90 Wash. L. Rev. 1727 (2015)

ANOTHER STUDY

- 4839 cases filed by consumers w/AAA between July 2009-December 2013
- Consumers win 35% of cases
- "Repeat players" outperform "one-shot" counterparts on win rates and damage payments on the company side; extreme repeat-playing companies dominate awarded cases (results not the same for consumer/plaintiffs' lawyers, but there are other explanations for that). "The overall consumer win rate against these firms was 9%, but it fluctuated from 14% in 2010 to 17% in 2011, before falling to just 9% in 2012 and a woeful 3% in 2013."
- Very few individuals bother to arbitrate minor grievances. In the entire four-and-a-half years covered by this study, only 184 of all 4,839 consumers in the sample demanded under $1,000.

- * David Horton and Andrea Cann Chandrasekher, AFTER THE REVOLUTION: AN EMPIRICAL STUDY OF CONSUMER ARBITRATION, 104 Geo. L.J. 57 (2015)

LEGISLATIVE SOLUTION?

Arbitration Fairness Act (AFA): Most recently introduced by Minnesota Senator Al Franken, the AFA would invalidate any provision that "requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute."

OTHER SOLUTIONS?

- GREATER TRANSPARENCY IN THE PROCESS(Lampley)
  - Written opinions/decisions
- MORE EMPIRICAL DATA/REPORTING (Lampley)
  - Consistent concern is many opinions about arbitration are not data-based
  - Very little data on litigated outcomes v arbitrated outcomes
  - California requires quarterly data reports from dispute resolution agencies about consumer arbitrations they conduct
- REQUIRE MEDIATION FIRST? (Schultz)

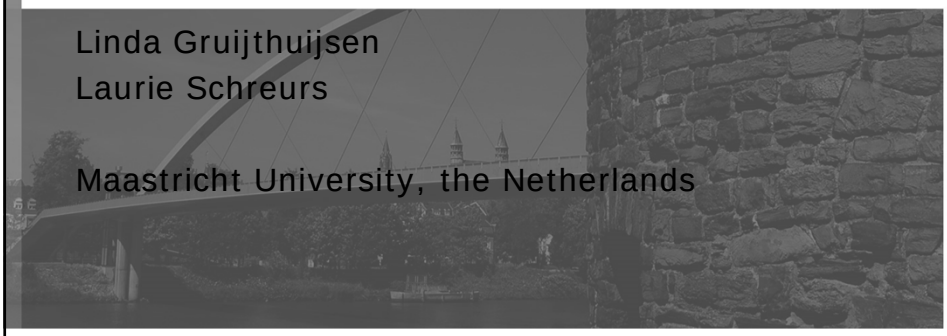
PUBLIC AND PRIVATE JUSTICE
May 24, 2016, Dubrovnik (Croatia)

Civil Procedure and Arbitration

What Practice Thinks of Benefiting from Practice

Linda Gruijthuijsen
Laurie Schreurs

Maastricht University, the Netherlands



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OUTLINE

- Introduction
- Arbitration in the Netherlands
- Research question
- Outline research
- Preliminary results
- Conclusion and general remarks

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INTRODUCTION

- Linda Gruijthuijsen
- Laurie Schreurs
- The MaRBLe Program

ARBITRATION IN THE NETHERLANDS

- Modernized arbitration law (2015)
  - Arbitration agreement
  - Jurisdiction of the civil court and the arbitral tribunal
  - Composition of the arbitral tribunal
  - Course of proceedings
    - Arbitration institutes
  - Arbitral award based on the law or "what good men do in all fairness"
  - Legal remedies

ARBITRATION IN THE NETHERLANDS

Main arbitration institutes

- *'Nederlands Arbitrage Instituut' (NAI)*
  - Independent organization
  - Founded in 1949
  - No publication of awards
  - NAI clause in arbitration agreement
  - Administrative costs range from €800,- to €25.000,-

NAI
Nederlands Arbitrage Instituut

- *'Raad van Arbitrage voor de Bouw' (RvA)*
  - Independent organization
  - Founded in 1907
  - Publication of awards
  - RvA clause not necessary
  - Administrative costs unknown

RvA
Raad van Arbitrage voor de Bouw

RESEARCH QUESTION

- No empirical data supporting cross-fertilization
  - New arbitration law copy of rules civil procedure
  - No developments in civil procedure inspired by arbitration practices
- Research questions:
  1. "How do arbitration and civil procedure interact?"
  2. "How may cross-fertilization between arbitration and civil procedure be maximized?"

OUTLINE RESEARCH

- Mixed-method approach
- Questionnaire by e-mail
- 5,000 Judges
- 12,000 Lawyers
- 266 responses

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OUTLINE RESEARCH

- Could you scale the following statements by giving them a grade on a scale of 1 to 5?
  1 stands for I totally agree
  5 stands for I totally disagree.
  - Arbitration proceedings are faster than civil proceedings
  - Arbitration proceedings are cheaper than civil proceedings
  - Arbitration proceedings give a more just outcome than civil proceedings
  - Arbitration proceedings can be tailored more to parties' needs than civil proceedings
  - Parties are more satisfied with arbitration proceedings than with civil proceedings
  - Arbitration proceedings will profit sooner from technical developments than civil proceedings will
- Have you ever used experiences from arbitration proceedings during civil litigation that you see as innovative for civil procedure? If so, could you give examples?
- Could you give examples of rules of civil procedure, which parties specifically wanted to deviate from in arbitration proceedings?
- Do you have any other information that might be of help for this research on cross-fertilization between arbitration and civil procedure?

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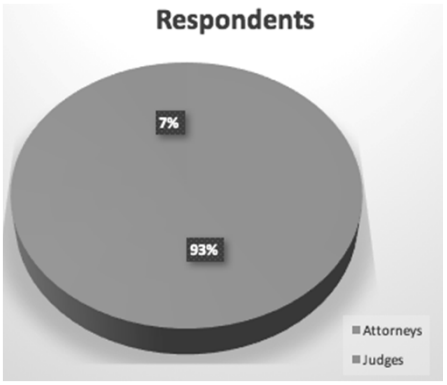
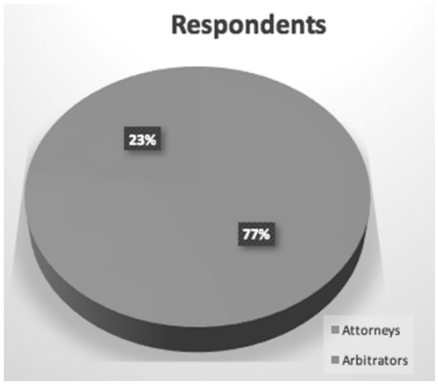
OUTLINE RESEARCH





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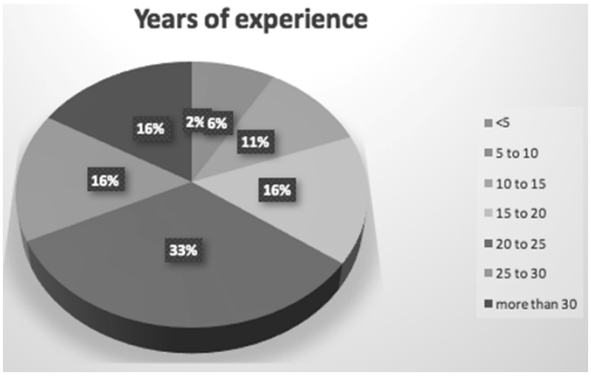
PRELIMINARY RESULTS



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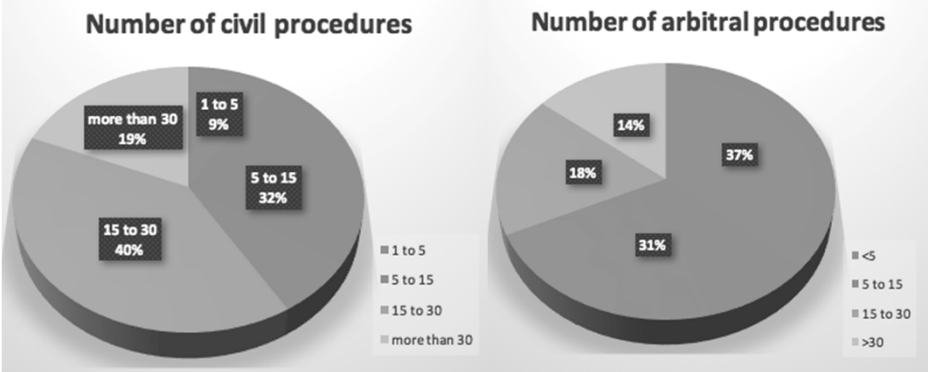
PRELIMINARY RESULTS



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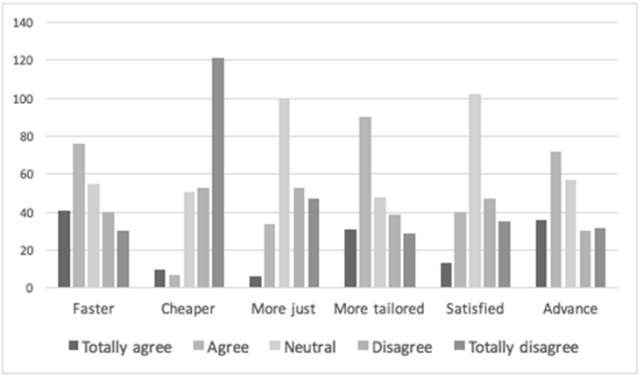
PRELIMINARY RESULTS



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PRELIMINARY RESULTS

Open question 1: *influence of arbitration on civil procedure*

- Audio-visual innovations
- Language
- Pre-trial sessions
  - Investigate relevant questions and issues
  - Timeline
- Arbitral case law
- Arbitral expert witnesses
- Judicial inspection

PRELIMINARY RESULTS

Open question 2: *reasons to choose arbitration over civil procedure*

- Avoid publicity
- Possibility of exclusion of appeal
- Timeline to assure fast trial
- Rules on evidence and submission of procedural documents
- Possibility to choose arbiter
- Principle of “like good men do in all fairness”

PRELIMINARY RESULTS

Open question 3: *additional opinions and experiences*

- Arbitration too expensive
- Poor (and poorly motivated) arbitral awards
- Poor legal protection in arbitration
- Arbiters less objective
- Arbitration only relevant in highly technical disputes
- Principle of "like good men do in all fairness" leads to unpredictability
- Possibility of Article 96 Dutch Code of Civil Procedure
- Arbitration more flexible than rigid civil procedure

CONCLUSION

- Minimal cross-fertilization
- Negative view
- In what way can both procedures learn from each other?

OBSERVATIONS

- *Arbitration*
  - Higher quality of arbitral awards is needed
- *Civil procedure*
  - Flexibility and informality are advisable

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Thank you for your attention!

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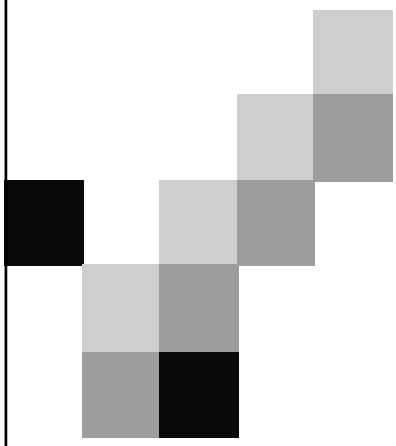


RAPPROCHEMENT OF ARBITRATION AND COURT PROCEEDINGS IN ISSUING PROVISIONAL MEASURES - POSSIBILITIES AND LIMITS

Prof. dr. Tatjana Zoroska - Kamilovska

Outline

- A starting point for an analysis 🡪
  - ✓ *Interim relief, or the lack thereof, can have a substantial or even determinative effect on the outcome of any case, whether submitted to litigation or arbitration.*

- Questions:

1. Is this an area where arbitration and litigation increasingly resemble each other, or they remain differentiated?

2. Can we talk about cross-fertilization or complamentarity between court litigation and arbitration in regard to provisional measures? What are the possibilities and limits?

   📖 **"Cross-fertilization" -** ***mutual exchange of ideas or concepts from different fields for mutual benefit.***

   "Complementarity" - ***a relationship or situation in which two or more different things improve or emphasize each other's qualities.***

3. What do the legal framework and practice show?

Raison d'être of the provisional measures as a procedural remedy

- The essence derives from two Latin phrases:

1. *"**fumus boni iuris"*** (likelihood of success on the merit of the case or an apparent existence of the right)
2. ***"periculum in mora"*** (danger in delay or the risk of imminent infringement of the right).

Under such two necessary conditions, the competent body, whether state court/arbitral tribunal should be able to grant provisional measures in order to provide an interim satisfaction or protection of the right.

- Doctrinal definition

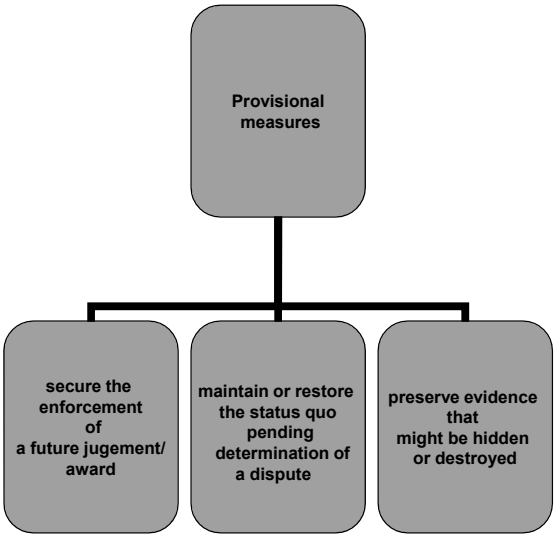
📖 *"**Grants of temporary relief aimed at protecting parties' rights pending the final resolution of a dispute**".*

- Objective

✓ Intend to maintain a legal or factual situation so as to safeguard parties' rights not to be damaged or affected due to the duration of the adjudication process.
  - ***ECJ - Case C-261/90* (*Reichert and Kockler v Dresdner Bank*)**

✓ Facilitate the effectiveness of the judicial or arbitral protection by providing measures which complement the final judgment/award.

Main purposes and effects



- Provisional measures are intended to have only a provisional effect pending the final resolution of the dispute.
- **A decision on provisional measure does not acquire res judicata effect** - be it in relation to the substantive claim, or in relation to a subsequent application for provisional measures.

Tradition in Civil Litigation

- Provisional measures as a *hallmark of civil litigation*.

- ✓ All sophisticated countries have developed detailed procedures under which parties may apply for, and under proper conditions, obtain a variety of provisional measures in court proceedings, prior or in the course of the litigation.
- ✓ Very diverse in different national legal systems, serve different functions, have different requirements and produce different effects.
- ✓ Still, provisional measures serve similar purposes and the basic elements found in them are the same (incl. court-ordered ex parte interim relief).
- ✓ State courts have powers to grant and enforce provisional measures.
- ✓ State courts have powers to grant provisional measures directed at third party.

Background in Arbitration

- Provisional measures in arbitration is *a relatively recent phenomenon.*

- ***Evolution***

1. General prohibition

2. Recognition of arbitral tribunals' powers to grant provisional measures (concurrent jurisdiction of state courts and arbitral tribunals)

3. Detailed provision for definition and scope, conditions for granting, modification, suspension, termination, security, recognition and enforcement (UNCITRAL Model Law of 2006, UNCITRAL Arbitration Rules of 2010) – just as in state courts' regime

4. *Ex parte interim relief*

5. Emergency arbitrator concept

6. Emergency arbitrator ex parte interim relief *(e.g. Swiss Rules of International Arbitration, 2012)*

Epilogue

- ✓ **Granting provisional measures *has constantly been upgraded and finally transformed in such a manner* that today the law governing arbitration in regard to this issue no longer differs radically from that involving litigation.**
- ➢ **Provisional measures in arbitration are an area of interface between the arbitral tribunal and the state courts** (due to some limitations and hurdles of arbitral tribunals' powers (e.g. lack of power to grant provisional measures directed at third party, or lack of coercive power to enforce the measures granted).
- ➢ From legal perspective, **it is definitely an area where litigation and arbitration increasingly resemble each other**.
- ➢ It fits into the debate that arbitration is being undermined by so-called "creeping legalism," "judicialization," or "incremental formalism".
- ➢ The evolution of interim measures as the most remarkable example of judicialization of 21st century arbitration.
- ➢ Quite apart form the general approach of this conference - viz. whether practices and routines developed in arbitration may have a positive impact on changes in litigation practices

there is a reverse process of influence of civil litigation on arbitration.

Two recent concepts borrowed from litigation

- **Emergency arbitrator concept** – come from the llitigation practice, tended to become a natural feature of most sets of arbitration rules (e.g. ICC, LCIA,SCC,SIAC, ACICA - operate automatically, opt-out) .

  "*It is fair to say that the idea of interim measures available prior to starting proceedings before state courts, familiar in one form or another in probably all legal orders, has thus been transposed mutatis mutandis into the realm of arbitration".*

  B. Gessel – Kalinowska vel Kalisz

- **Various models/common features**

1. emergency arbitrator is appointed by the institution
2. a decision for interim relief may be obtained before filing the final request for arbitration
3. expediency

- **Ex parte interim relief** - it is an established feature in court litigation in almost all common law and civil law jurisdictions, but it admissibility and aptness continues to be disputed in arbitration.

- **"Hot topic"** –highly controversial subject that poses many questions and problems!!!
- Arguments pros and cons.

Some personal consideration and criticism

- The underpinnings:
  - ✓ the fact that the phenomenon of so-called “judicialization” of arbitration must not be understood as a process of simple copying, but rather transposition of some classic litigation tools into the realm of arbitration.
  - ✓ the transposition necessarily presupposes filtering these litigation tools though the basic principles of arbitration (party autonomy, contractual nature of arbitration, equality of parties, confidentiality).
- Question: whether this transposition is sufficiently well done and what are the hurdles?

Some personal consideration and criticism

- **Emergency arbitrator concept**

- *Positive development*. When?
  - ✓ If a party desires to prevent the opponent party from dissipating assets or evidence, at same time preserving the confidentiality of the arbitration, or if there are concerns that the state courts cannot act in timely manner, or as to the impartiality or competence of the state court.

- Drawbacks. When?
  - if interim relief is required against a third party or in cases where an element of surprise is vital.

  ➪ State courts are unavoidable resort.

- **Ex parte interim relief**

- Does not match with the role of an arbitral tribunal in the eyes of the parties. Why?

- It does not goes along with the character of tribunal as a creation of the parties/amiable forum.
- It is starnge to expect the tribunal to receive a secretive communication from one party and pass binding order thereon.
- The process of issuance of an ex parte relief itself (first provisionally and then finally) suggests that it is better to leave the issue of an *ex parte reliefs* to the state courts.
- An *ex parte* interim order by the tribunal although "binding" is not capable of being enforced in court.

Practical perspective

- Provisional measures *are vital and almost daily tool in litigation* (e.g. *seizure/attachment* or *interim freezing injunction* etc).
- Some surveys and statistics suggest that provisional measures are not applied too frequently in arbitration.
- Exempli gratia
  - ICC practice - from 1985 to 2000 there have been 75 ICC cases only in which some form of interim relief has been sough.
  - LCIA practice - from January 2004 to May 2006, 245 arbitration proceedings were commenced, with 16 applications for expedited proceedings, out of which 8 asked for interim measures.

Practical perspective

- *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process* (Queen Mary University of London, School of International Arbitration) suggests quite similar figures

  - "While much ink has been spilled on discussing the use and effectiveness of interim measures in international arbitration, **the survey reveals that such measures are in fact relatively uncommon**: 77% of respondents said they had experience with such requests to arbitral tribunals in only one-quarter or less of their arbitrations. Even rarer are requests for interim measures in aid of arbitration to courts: 89% of respondents had experience with them in only one-quarter or less of their arbitrations.

    To put it another way, **only 7% and 4% of respondents had experience with such requests to arbitral tribunals and to courts, respectively, in at least half of their arbitrations.**

    On average, only 35% of all interim measures applications addressed to the arbitral tribunal are granted – and of those applications which are granted, the majority are complied with voluntarily (62%)".

Practical perspective

- The use of emergency arbitrator concept in practice.
  - ✓ the use of this tool is still modest.

  ⌦ ICC practice - In 2012 - 2 cases, in 2013 - 6 cases; in 2014- 6 cases: in 2015-10 cases.
  ⌦ SCC practice - Since 1 July 2010, one to four applications have been filed per year.

- **Conclusion**

✓ The judicialization of arbitration regarding provisional measures is basically theoretical and normative in nature and thus, deprived of considerable practical importance. The frequency of granting provisional measures in arbitration at this moment apparently does not give us material to support the debate on the positive impact of arbitration on changes in litigation practices in this area.

✓ Quite opposite, one may reasonably doubt whether parties really need provisional measures of protection issued by arbitrators.

ARBITRATION AS A MATTER OF INSPIRATION FOR REGULAR COURTS IN NORWAY?

THE ACTS

The Arbitration Act

- From 2004
- Based on UNCITRAL Arbitration Rules
- Wide party's autonomy (§ 2)

Dispute Act

- From 2005, went into force 2008
- Applicable in all civil cases
- Inspired by the Woolf-refom

ARBITRATION AS A SOURCE OF LAW

- Substantive law:
  - Several examples where judgments made by arbitration courts are relevant sources of law
  - Especially contract law, but also some parts of tort law, company law and property law
- Procedural law:
  - I've never heard of any use of judgments from arbitration courts as sources of law in general civil procedure law

INFLUENCE FROM PRACTICE IN ARBITRATION?

- Are there, in Norwegian law, any influence from practices in arbitration to ordinary civil procedure law?
- I've never heard of any such influence!

THE ARBITRATION ACT IN THE INTERPRETATION OF THE DISPUTE ACT

- division between dispositive and non-dispositive cases
  - Erik Eldjarn, *Materiell prosessledelse* [Materiell Prosessleitung]:
    - using The Arbitration Act section ... arguing that certain aspects of Competition cases are so-called «non-dispositive»
- The Arbitration Act section 9 (2):

"The private law effects of competition law may be tried by arbitration."

THE ROLE OF ARBITRATION IN REFORMS OF ORDINARY CIVIL PROCEDURE

- Nearly all large business cases are handled by arbitration courts
- Is that a problem?
  - Basically; no!
  - But:
    - Ordinary civil procedure should be a real option
    - Need for authoritative clarifications on contract law issues

… BIG CASES TRACK?

- Last number of the leading Law Journal *Lov og Rett is devoted to Big Case Proceedings*
- The Dispute Act includes two «tracks»
  - Small claims track
  - Main hearing track
  - Problem: there is a track adapted to small cases, but there is no solution to large cases
    - F.ex: problems where many documents are relevant

…

- (1) there is a general principle of proportionality, cf. the Dispute Act sections § 1-1 and 21-8
- (2) the court has a general power and duty to actively manage every case

...

- (3) Some features typical of arbitration, are optional in ordinary civil proceedings:

The Dispute Act section 29-6: Waiver of the right of appeal

(1) The right of appeal may be waived. The right of appeal may only be waived before the ruling is pronounced if the waiver is mutual. Notwithstanding that the right of appeal has been waived before the ruling, an appeal may be brought on the grounds of error pursuant to section 29-21(2).

(2) The right of appeal must be waived expressly.

THE DISPUTE ACT AS A LEGAL BASIS IN ARBITRATION?

- A number of issues concerning application of NDA in arbitration cases have been addressed, f.ex:
  - Are the rules on access to evidence in NDA chapter 26, 27 and 28 applicable in arbitration?
  - Are rules on costs applicable in arbitration?
  - ...

Professional Secrecy, Legal Professional Privilege: Same or Different in Arbitration and Civil Litigation?

Jorg Sladič
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Introductory Remarks

Governments shall recognize and respect that all ommunications and consultations between lawyers and their clients within their professional relationship are confidential." (***Art. 22 UN Basic Principles on the Role of Lawyers***).

However, ICJ case *East-Timor v. Australia*): interim measure

ECJ: *Akzo Nobel v. Commission*, C-550/07 P

Importance in the EU

- *Akzo Nobel* : Opinion of AG Kokott (para. 47): In EU law, the protection of legal professional privilege has the status of a general legal principle in the nature of a fundamental right. This follows, on the one hand, from the principles common to the legal systems of the Member States: legal professional privilege is currently recognised in all 28 Member States of the European Union, in some of which its protection is enshrined in case-law alone, but in most of which it is provided for at least by statute if not by the constitution itself.

Importance in the EU

On the other hand, the protection of legal professional privilege also derives from Article 8(1) of the ECHR (protection of correspondence) in conjunction with Article 6(1) and (3)(c) of the ECHR (right to a fair trial) as well as from Article 7 of the Charter of Fundamental Rights of the European Union (respect for communications) in conjunction with Article 47(1), the second sentence of Article 47(2) and Article 48(2) of that Charter (right to be advised, defended and represented, respect for rights of the defen.

Limitations to Procedure in the EU:
moneylaundering

- ECHR: ***Michaud v. France***
- CJEU: ***Ordre des barreaux francophones et germanophone*** , C-305/05

Secret Professionnel v. Legal Professional Privilege

- Origins in medieval period,
- ***Civil law legal systems***: Secret professionnel (*Anwaltsprivileg*): ratione persone applied to lawyer, obligation to remain silent (*Schweigepflicht*) conferred by the membership of the bar (profession), :=> also in Slovenia
- ***Common law legal systems***: Legal Professional Privilege: ratione materiae applied to documents conating legal advice : *litigation privilege*, *legal advice privilege*

Practical difference between groups of legal systems

In - house lawyers **in civil law legal systems are traditionally not granted the privilege of professional secrecy :=> exceptions: the Netherlands and Belgium**

Common European Core

- Code of Conduct adopted by the ***Council of Bars and Law Societies of Europe***

The lawyer's obligation of confidentiality serves the interest of the ***administration of justice*** as well as the interest of the client. It is therefore entitled to special protection by the State

administration of justice

administration of justice:

public service offered by the State for dispute resolution

LPP applied to civil lawsuits

The *lex fori* grants LPP to lawyers in civil, commercial and administrative litigation

Slovenian law: Art. 229 - 235 CCP: a relative prohibition of taking of evidence with lawyers testifying: lawyers are only **relatively incapable of being witnesses** (in criminal procedure lawyers are absolutely incapable of being witnesses)

The lawyers has the right to refuse to give testimony on information confided by the client.

Infringement of legal privilege by the court hearing the case does not necessarily lead to setting asside

Administrative Court of Slovenia

The Administrative Court of Slovenia considered that lawyers gathering data on the other party (not their client) are processing personal data and are acting as controllers within the meaning of professional secrecy does not deal in personal data processing, the data protection legislation is a lex specialis in relation to professional secrecy.

Claiming professional secrecy of lawyers cannot be a successful defence against a natural person requiring to be handed over personal data in lawyer's files. **According to the Administrative court protection of personal data is a human right, whereas professional secrecy of a lawyer is not**.

Arbitration

- ***administration of justice?***
- ***Practically different approach to arbitration where LLP is not granted in arbitration***
- ***ECHR: perhaps indirect application of Art. 6(1) ECHR in arbitration (Jakob Boss v. Germany, Regent Company v. Ukraine)***
- ***Questionable := > need to assess the Rules of Arbitration***
- ***However, Rules of Arbitration are usually silent on the matter***

IBA Rules

- IBA Rules on the Taking of Evidence in International Arbitration
- Article 9 Admissibility and Assessment of Evidence

1. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.

2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any document, statement, oral testimony or inspection for any of the following reasons: (b) *legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable*

Possible solutions

- ***lex contractus,***
- ***lex arbitri*** **(i.e. the *lex fori*),**
- ***lex nationalis*** **of the lawyer,**
- **law of the state where documents are stored.**

THANK YOU

ON INCREASING "JUDICIALIZATION" OF ARBITRAL RULES IN CROATIA

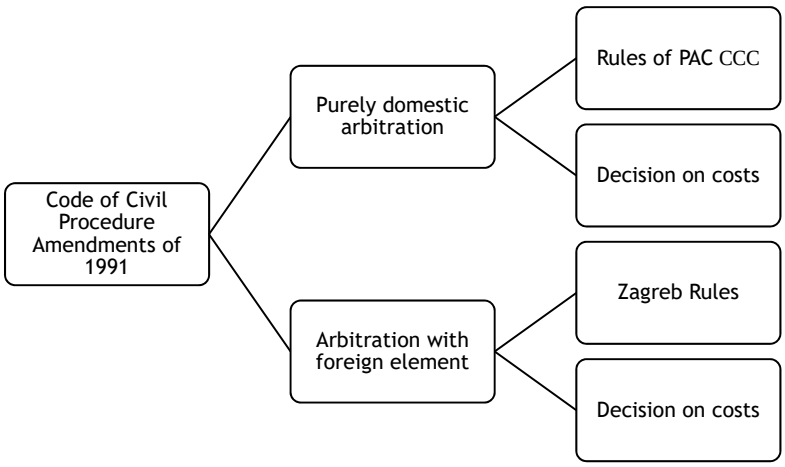
Evolution of Zagreb Rules in the 1992-2016 Period

Juraj Brozović
Department for Civil Procedure
Faculty of Law, University of Zagreb

Arbitration in former Yugoslavia

- in accordance with socialist tradition
- 1946. Foreign Trade Arbitration in Belgrade – the only institution competent for solving international 'commercial' arbitration disputes
- 1963. Constitutional amendments as basis for the introduction of domestic arbitration
- 1966. Rules of the PAC of CCC
- 1976. new Code of Civil Procedure
- general lack of trust towards domestic arbitration (jurisdiction, termination of arbitration agreement, annulment of the awards)

Arbitration reforms in early 90's



Rules of the PAC of CCC (1985)

- Very few modern elements:
- form of arbitration agreement
- doctrine of separability
- Unattractive or old-fashioned elements:
- wide range of provisions allowing the PAC to deny its jurisdiction
- interim measures only issued by courts
- wide range of provisions inspired by Code of Civil Procedure (contents of statement of claim, request to set-off, payment orders, supsidiary application of CCP, formal co-litigation, legal remedies)

Zagreb Rules 1992: Inspiration

1. UNCITRAL ARBITRATION RULES 1976
- 34 of 52 provisions are a direct or analogue translation
2. UNCITRAL MODEL LAW 1985
- definition of international arbitration (even before the AA)
- joint solutions of UNCITRAL Arbitration Rules
3. ICC RULES/VIENNA RULES
- jurisdiction (commercial matters and one party with foreign seat)
- decision on costs
4. CODE OF CIVIL PROCEDURE & TRADITIONAL RULES
- statement of claim
- joint nomination of arbitrators for co-litigants
- counterclaim
- language
5. ORIGINAL SOLUTIONS
- no termination of proceedings? (UNCITRAL solutions)
- interim awards in case of interim measures?

Unique Zagreb Rules (2002)

- new Croatian Arbitration Act
- merger of Zagreb Rules 1992 & Rules of PAC CCC 1985:

- wide range of provisions inspired by Code of Civil Procedure (contents of statement of claim, request to set-off, payment orders, ~~supsidiary application of CCP~~, formal co-litigation, ~~legal remedies~~)
- judicialization of the rules of evidence
- no rules for the challenge of arbitrators

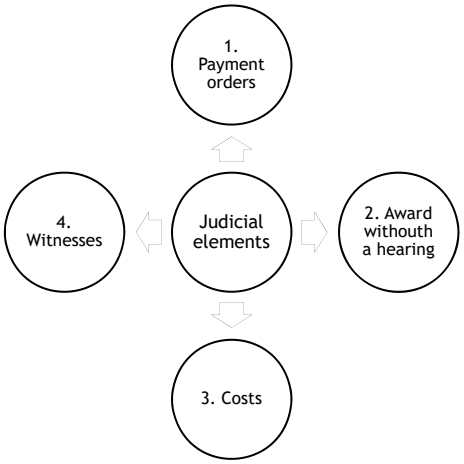
Further development of Zagreb Rules

- Zagreb Rules 2011:
- introduction of electronic service of documents, case management methods (terms of reference, procedural calendar), reintroduction of ZR 1992 elements
- even greater influence of domestic procedural rules (even more detailed regulation of request to set-off, co-litigation, introduction of the rules for the determination of the value of the dispute)

Further development of Zagreb Rules

- Zagreb Rules 2015:
- introduction of expeditious proceedings
- (shorter) deadlines
- further influence of domestic procedural rules (introduction of award without a hearing, rules on the taking of evidence)

Zagreb Rules now – potential problems



1. Payment orders

- Historical development

1966 – Art. 30 of the Rules of the PAC of CCC
1969 – Decision of Constitutional Court of Yugoslavia regarding constitutionality of payment orders issued in arbitration proceedings
1985 – Rules of the PAC of CCC for domestic purposes only
2002 – Zagreb Arbitration Rules for all arbitration proceedings
2011 – Zagreb Arbitration Rules for domestic purposes only

1. Payment orders

- prerequisites under CCP:
- monetary claim
- must be supported by thrust-worthy document if value above app. 670 €
- legal interest
- issued by the President of the PAC

1. Payment orders

FOR	AGAINST
• Arbitration panels substitute the court • Such possibility is not excluded in the Arbitration Act • Arbitration rules guarantee the parties same extent of protection	• Not so common in arbitration • Payment orders do not necessarily presuppose the existence of a dispute (the purpose is different) • Problems relating competitive jurisdiction (public notaries and enforcement proceedings) • Legal interest?

1. Payment orders

Period (Oct – Oct)	Number of orders
2008 – 2009	18
2009 - 2010	53
2013 - 2014	0

Source: The official reports of the Secretariat

2. Award without a hearing

Article 56

(1) If arbitral tribunal determines, after examining statement of claim, answer to statement of claim and submitted documents, that the facts of the case have not been contested or that they can be determined on the basis of such documents, it can render an award without a prior hearing.

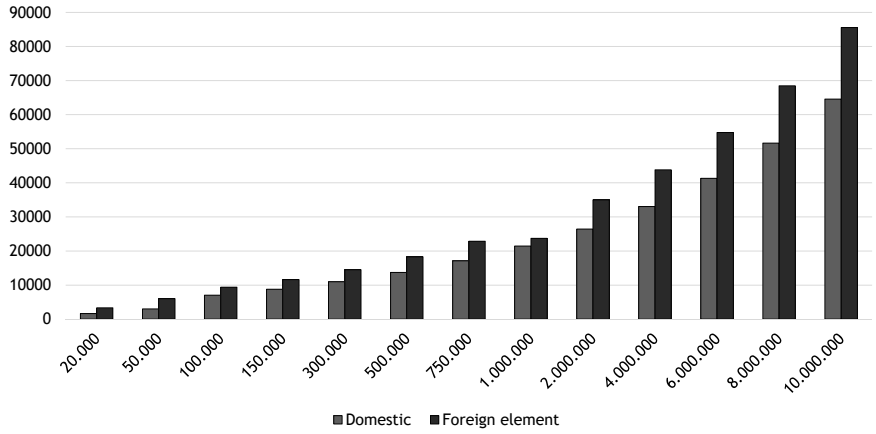
(2) In that case, arbitral tribunal will previously notify the parties that it intends to render an award without a hearing, except when one of the parties requests the arbitral tribunal to hold a hearing to discuss whether the prerequisites for its rendering are met.

(3) The party shall file its request within 8 days after receiving the notification of the arbitral tribunal.

- previous similar solutions: Art. 47 of Rules of PAC 1985 (default judgment) – continuation of proceedings!
- organizational issues
- full opportunity to present one's case?

3. Decision on costs

Comparison of arbitrators' fees in arbitration with/without foreign element



3. Decision on costs

The arbitral tribunal shall be free to determine the costs of the proceedings as it deems to be appropriate, taking into account all the circumstances of the case, especially the outcome of the proceedings.

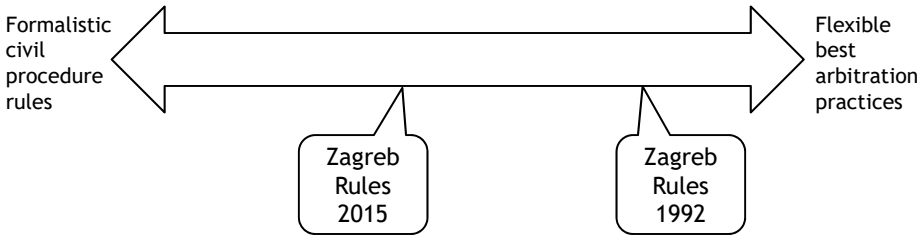
EXEMPTIONS FROM THE FLEXIBILITY RULE:

1. Costs due to non-compliance in regard to (electronic) exchange of documents
2. Costs due to non-filing of lawsuit instead of request to set-off

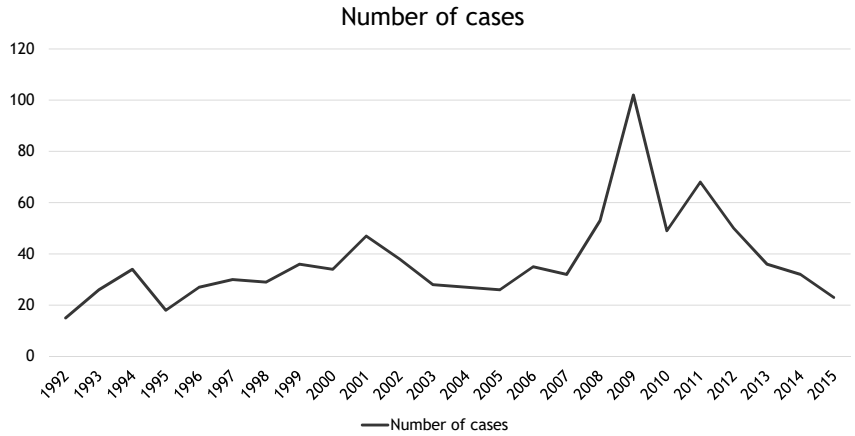
4. Witness statements

- Zagreb Rules 1992
  Evidence of witnesses may also be presented in the form of written statements signed by them.
- Zagreb Rules 2002 and 2011 – no witness statements
- Zagreb Rules 2015
- witness statement at the discretion of the tribunal
- interrogatories
- public certification of signature, if parties do not agree otherwise
- conformity with the IBA Rules?

Zagreb Rules: Then and now



On consequences



Source: *1. Uzelac, Croatia (national report), in: International Handbook on Commercial Arbitration, Kluwer Law and Tacation Pub., 2009*
2. The official reports of the Secretariat

On consequences

- If parties agree that the PAC of CCC will administer their arbitration, but not under the Zagreb Rules, but under the rules of some other arbitral institution, those rules, if parties do not agree otherwise, do not apply on:
- composition of the arbitral tribunal
- rights of the PAC in regard to the administration and organization of proceedings
- filing fees and administrative expenses (only if they are lower than the ones under the Zagreb Rules)
- Relation to Art. 1(2) ICC Rules?!

What does the future bring?

PAS – Parnični arbitražni sud (Contentious arbitration court)

- (contentious) civil procedure:
- Croatian law as applicable law
- subsidiary application of Code of Civil Procedure
- appeal
- payment orders
- 1 case so far

Thank you for your attention!

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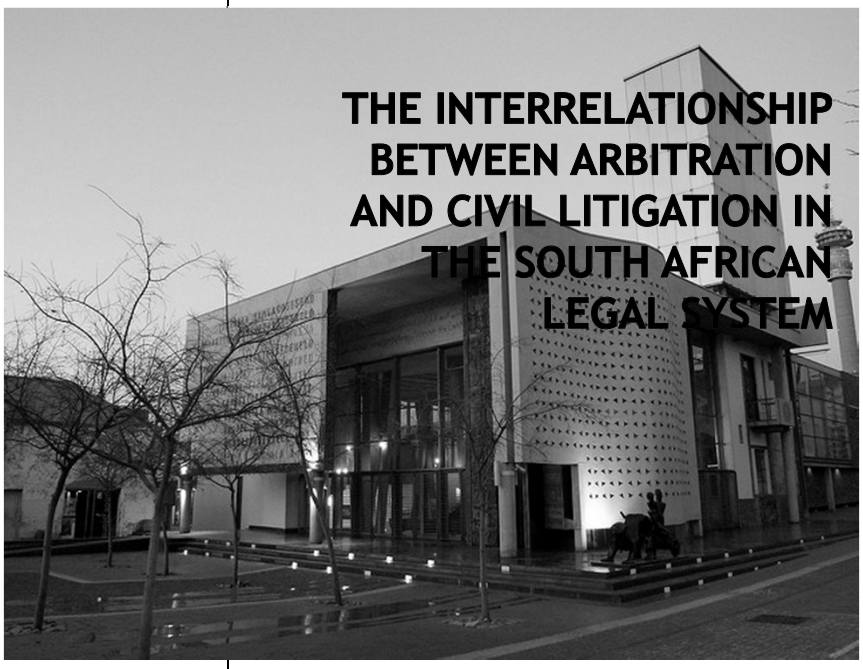

THE INTERRELATIONSHIP BETWEEN ARBITRATION AND CIVIL LITIGATION IN THE SOUTH AFRICAN LEGAL SYSTEM

DOMESTIC ARBITRATION

- **1. <u>The impact of the Constitution of the Republic of South Africa on arbitration</u>**

- Final Constitution of the Republic of South Africa adopted in 1996.
- Section 34 provides that: "*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.*"
- *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 (4) SA 661 (SCA) – held that arbitration is not unconstitutional.

DOMESTIC ARBITRATION

- *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 (4) SA 529 (CC) – held that language of s 34 does not fit concept of private arbitration.
- Where party chooses private arbitration for resolution of dispute – not having effect of a waiver of the rights under s 34 but rather a decision not to exercise right under s 34.
- Fact that s 34 not applicable to arbitration does not mean that fairness is not a requirement of arbitrations.
- Arbitration agreement that provides expressly for procedure that is unfair may be regarded as *contra bonos mores*.

DOMESTIC ARBITRATION

- **2. <u>The Arbitration Act 42 of 1965</u>**

- Before 1965 arbitration in South Africa was regulated by certain provincial ordinances.
- These ordinances were repealed on 14 April 1965 and replaced by the Arbitration Act 42 of 1965.
- Common law however still applicable to verbal arbitration agreements, which are extremely uncommon.
- The Act applies to all arbitrations which commenced after 14 April 1965 regardless of when the arbitration agreement was concluded.
- No distinction made between domestic and international arbitration in the Act.
- The purpose statement of the Act provides for: "*the settlement of disputes by arbitration tribunals in terms of written arbitration agreements and for the enforcement of the awards of such arbitration tribunals*."

DOMESTIC ARBITRATION

- In s 1 of the Act an arbitration agreement is defined as "*a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not*".
- Arbitration proceedings is defined as "*proceedings conducted by an arbitration tribunal for the settlement by arbitration of a dispute which have been referred to arbitration in terms of an arbitration agreement*".
- Tribunal is defined as "*the arbitrator, arbitrators or umpire acting as such under an arbitration agreement*".

DOMESTIC ARBITRATION

- The Act is also applicable to situations where the State is a party to an arbitration agreement and to every arbitration under any law passed before or after the commencement of the Act (s 40).
- The Act is however not applicable to:
  - (a) any matrimonial cause or any matter incidental to any such cause (s 2);
  - (b) any matter relating to status (s 2);
  - (c) an arbitration agreement between the State and the Government of a foreign country or any undertaking which is wholly owned and controlled by such a Government (s 39);
  - (d) arbitration conducted under the auspices of the CCMA (s 146 of the LRA);
  - (e) criminal matters (common law).

DOMESTIC ARBITRATION

- Distinction made between institutional arbitration and *ad hoc* arbitration.
- Institutional arbitration is where the parties make use of an institution to administer the arbitration in accordance with its own rules.
- Prominent institutions include the Arbitration Foundation of South Africa (AFSA) and the Association of Arbitrators (ASA).
- In an *ad hoc* arbitration the parties administer the arbitration themselves. Parties can agree on their own procedure or choose to incorporate existing rules of procedure such as the Uniform Court Rules which are applicable in High Court actions and applications.
- Parties must also make their own arrangements for the appointment of the tribunal.

DOMESTIC ARBITRATION

- **3. <u>The Commission for Conciliation, Mediation and Arbitration ("CCMA")</u>**

- Before 1995 the State took primary responsibility for the resolution of labour disputes.
- In 1995 the CCMA, an independent commission was created by the Labour Relations Act 66 of 1995 which shifted the responsibility for the resolution of labour disputes to employers, labour and the state jointly.
- Since its inception, the CCMA has enjoyed a national settlement rate of 70% and greater in contrast with the previous dispute resolution processes which resulted in only 20% of disputes being settled.
- In its first ten years in existence the CCMA handled over a million cases and on average 120 000 cases are referred to the CCMA annually.

DOMESTIC ARBITRATION

- Most labour disputes eg unfair dismissals and unfair labour practices follows a compulsory two-stage process.
- Dispute must first be referred to conciliation – includes mediation, fact-finding and making a recommendation to the parties.
- If conciliation fails, matter can be referred by either party for arbitration.
- Differs from private arbitration in that parties have very little say in the appointment of commissioners.
- Also provides for a procedure called con-arb, where matter is immediately arbitrated if conciliation between the parties fail.

DOMESTIC ARBITRATION

- **4. <u>Other tribunals</u>**

- Such as the South African National Soccer League Dispute Resolution Chamber – deals with all disputes, except those of a disciplinary nature, in professional football in South Africa.

INTERNATIONAL ARBITRATION

1. **UNCITRAL Model Law on International Commercial Arbitration**

- The UNCITRAL Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law on 21 June 1985.
- It provided a framework within which international commercial arbitrations could be conducted with a minimum degree of judicial intervention and a significant degree of party autonomy.
- It was intended for adoption by individual countries with a minimum of adaptation.
- At long last in the process of being adopted by South Africa.

INTERNATIONAL ARBITRATION

- South Africa did ratify the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) on 3 May 1976.
- The Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 was adopted in 1977 and provides that:
- (a) Foreign arbitral awards may be made an order of a South African court and enforced as such;
- (b) How applications should be made for an arbitral award to be made an order of court;
- (c) When an order of court may be refused.

INTERNATIONAL ARBITRATION

2. **Proposed draft International Arbitration Bill for South Africa (South African Law Commission, Project 94 of 1998)**

- In 1998 the SA Law Commission stated that South African law does not currently promote international commercial arbitration.
- The Arbitration Act 42 of 1965 contains no provisions which expressly deal with international arbitration, while the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 is limited to the enforcement of foreign awards only.
- The Law Commission therefore made certain recommendations which can be summarised as follows:

INTERNATIONAL ARBITRATION

- (a) The compulsory application of the Model Law to international commercial arbitration.
- (b) That Act 40 of 1977 should be repealed and replaced by legislation which deals expressly with both the recognition and enforcement of foreign arbitral awards.
- (c) That South Africa should follow the example of most other African countries and ratify the Washington Convention, as this would create the necessary legal framework to encourage foreign investment and further economic development in the region.

INTERNATIONAL ARBITRATION

3. <u>The International Arbitration Bill of 2016</u>

- On 13 April 2016 cabinet approved the draft International Arbitration Bill for submission to Parliament for debate and approval.
- On 28 April 2016 the Bill was published in the Government Gazette.
- The Bill will shortly be introduced into Parliament and will become the highly anticipated International Arbitration Act.
- The purpose statement of the Bill provides as follows: "*To provide for the incorporation of the Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on International Trade Law, into South African law; to provide anew for the*

INTERNATIONAL ARBITRATION

- *recognition and enforcement of foreign arbitral awards; to repeal the Recognition and Enforcement of Foreign Arbitral Awards Act, 1977; to amend the Protection of Businesses Act, 1978, so as to delete an expression; and to provide for matters connected therewith*."
- Highlights of the new dispensation will include:
- (a) the Act will be binding on all public bodies;
- (b) the Model Law (subject to specific exclusions) will have the force of law in SA;
- (c) international commercial arbitrations with public bodies to the extent not prohibited by the Protection of Investment Act will be possible and must be distinguished from investor-state arbitrations;
- (d) immunity will be granted to arbitrators (as well as their institutions and representatives) acting in good faith;

INTERNATIONAL ARBITRATION

- (e) arbitrations involving any public body are to be held in public, unless the arbitrator based on compelling reasons directs otherwise. (There is no presumption as to confidentiality of other proceedings which will be determined by agreement between the parties);
- (f) parties to an international arbitration agreement may refer their dispute to conciliation in accordance with the UNCITRAL Conciliation Rules;
- (g) the Recognition and Enforcement of Foreign Arbitral Awards Act will be replaced by chapter 3 of the Act giving effect to the New York Convention;
- (h) the permission of the Minister of Economic Affairs will not be required for the enforcement of certain foreign arbitral awards;

INTERNATIONAL ARBITRATION

- (i) a foreign arbitral award must be made an order of court upon application, save for certain exceptions (*inter alia* that the subject matter is not arbitrable in SA, the enforcement is against public policy or is in bad faith);
- (j) security for costs may no longer be ordered against a foreign party at the commencement of the arbitration proceedings.

INTERRELATIONSHIP BETWEEN ARBITRATION AND CIVIL LITIGATION

1. **Party autonomy and jurisdictional issues**

- The English Arbitration Act defines party autonomy as the freedom of the parties to an arbitration agreement or proceedings to agree how their disputes are to be resolved, subject only to those safeguards which are necessary in the public interest.
- Arbitration Act of 1965 does not completely adhere to this principle as it makes provision for considerable court interference.
- For example ss 3(2) and 6 of the 1965 Act give the court a comparatively wide discretion not to enforce the parties' agreement to refer their dispute to arbitration.

INTERRELATIONSHIP BETWEEN ARBITRATION AND CIVIL LITIGATION

- The powers of the court in s 21 of the existing Act are also wide by modern standards, allowing the court to deal with matters which other jurisdictions regard as being best left to the arbitral tribunal.
- Several decisions by South African courts confirmed that arbitration agreements do not oust the jurisdiction of the courts.
- Courts will however usually honour the arbitration agreement of the parties – in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) the SCA stated that the courts must respect the freedom to contract as contractual autonomy also informs the constitutional value of dignity.
- Where certain special circumstances are present the courts will be more inclined to decide the matter even if there is an arbitration agreement between the parties.

INTERRELATIONSHIP BETWEEN ARBITRATION AND CIVIL LITIGATION

- These special circumstances can include factors such as the urgency of the matter, the complexity of the issues, matters relating to public policy or the infringement of fundamental rights, matters where an arbitration award would be unenforceable and instances where a party would be prejudiced in that he would enjoy less rights than if the matter would have been heard by a court.
- The onus is on the party who is seeking to by-pass the arbitration agreement to convince the court that special circumstances exist and that the court should decide the matter immediately.

INTERRELATIONSHIP BETWEEN ARBITRATION AND CIVIL LITIGATION

2. **Presentation of evidence**

- Traditional view that the ordinary rules of evidence are applicable in an arbitration, unless agreed otherwise by parties in arbitration agreement.
- Butler and Finsen convincingly argues that by implying a term that the ordinary rules of evidence are applicable where the arbitration agreement is silent on this matter, the main three advantages of arbitration, namely speed, cost-effectiveness and flexibility are undermined.
- These authors submit that this rule should be reformulated to state that, unless the arbitration agreement expressly or by implication provides differently, the arbitrator should not be obliged to comply with the formal rules of evidence, as long as the procedure which is followed complies with the rules of natural justice.

INTERRELATIONSHIP BETWEEN ARBITRATION AND CIVIL LITIGATION

3. **Means of recourse**

- Section 28 of the Arbitration Act provides that "*unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms.*"
- The issues determined by the arbitrator therefore becomes *res iudicata*, unless the arbitration agreement provides for a right of appeal to another arbitration tribunal.
- Section 31 makes provision for an arbitration award to be made an order of court on application and provides that such an order of court may be enforced in the same manner as any other judgment or order of a court.

INTERRELATIONSHIP BETWEEN ARBITRATION AND CIVIL LITIGATION

- In terms of section 33(1) an arbitration award may be set aside where:

- (a) Any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator;
- (b) An arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings;
- (c) Where an arbitration tribunal has exceeded its powers;
- (d) Where an award has been improperly obtained.

PROPOSALS FOR REFORM

1. **The Law Commission (Domestic Arbitration, Project 94 of 2001)**

- Law Commission proposed that South Africa should not adopt the Model Law for domestic arbitration.
- The Law Commission included a Draft Bill on domestic arbitration in its report which is based on a combination between:
- (a) The current Arbitration Act of 1965;
- (b) Certain provisions of the UNCITRAL Model Law;
- (c) The English Arbitration Act of 1996.

PROPOSALS FOR REFORM

- Four objectives of arbitration identified by Law Commission:
- (a) First (prime) objective - to obtain the fair resolution of disputes by an independent and impartial arbitral tribunal without unnecessary delay or expense.
- Changes proposed to promote expeditious and cost-effective arbitration:
- The following provisions, based on the English Arbitration Act of 1996, are designed to improve the efficiency of the arbitral process:
- • The imposition of a statutory duty on the arbitral tribunal to avoid unnecessary delay and expense (s 28(1)(b));

PROPOSALS FOR REFORM

- The imposition of a general duty on the parties to facilitate the proper and expeditious conduct of the proceedings (s 35);
- The granting of a power to the arbitral tribunal to limit recoverable costs (s 56).
- The second objective should be the promotion of party autonomy which includes the principle of flexibility.
- The third objective should be balanced powers for the court.
- The following are the main examples of enhanced powers for the arbitral tribunal:
- A new general power, subject to procedural fairness and the arbitration agreement, to conduct the arbitration as it deems fit (s 29(1));

PROPOSALS FOR REFORM

- A limited power to allow the joinder of a third party (s 12);
- The power to rule on its own jurisdiction (s 26);
- A limited power to order interim measures (s 29(2)(b)(iii));
- The power to extend certain time limits (s 29(2)(b))(v));
- The power to dispense with an oral hearing (ss 29(2)(a)(iv) and 33(1));
- The power to depart from the ordinary rules of evidence (s 30);
- The power to order security for costs (s 31(2));
- The power to call a witness (s 31(5));
- Enhanced powers in the event of a party's default (s 36);

PROPOSALS FOR REFORM

- In addition to the power to make an interim award, the power to make a provisional order regarding aspects of the merits of the dispute, which it may reconsider in its final award (s 46);
- Enhanced powers to correct errors in or to clarify an award (s 50).
- The proposed changes to the powers of the court are intended to provide enhanced judicial support for the arbitral process, while preventing applications to court from being abused as a delaying tactic:
- The discretionary power of the court *not* to enforce an arbitration agreement has been restricted in line with international standards (s 9);
- The power of the court to rule on jurisdictional issues has been clarified (ss 26, 27 and 52(2)(a)(i) and (iii));

PROPOSALS FOR REFORM

- The powers of the court to extend the time limit for commencing arbitral proceedings and to decide on a question of law have been refined (ss11 and 39);
- The court's power to grant interim relief has been strengthened, whereas its power to decide procedural issues has been reduced (s 40);
- The grounds on which a court may refuse to enforce an award have been specified (s 53);
- The court's power to order remittal of an award has been restricted, in line with international trends (s 52(4)).
- The fourth objective should be to ensure that the arbitral tribunal has adequate powers to proceed with the arbitration and to complete it without avoidable delay by making an award, in a situation where either of the parties cannot agree on the procedure to be followed.

PROPOSALS FOR REFORM

- The following are the main changes relating to the award:
- The award must be reasoned unless parties otherwise agree (s 43(3));
- Provision has been made for an award, with the consent of the tribunal, on agreed terms (s 44);
- The provisions regarding the time for making the award (s 42) and its delivery to the parties have been revised (s 45).
- The following are some of the other main changes proposed relating to the arbitral tribunal:
- The abolition of statutory provision for an umpire as opposed to a three-member tribunal (ss 16 and 17);
- Limited provision is made for the immunity of arbitrators from liability (s 25);

PROPOSALS FOR REFORM

- The consequences of an arbitrator's resignation are regulated (s 23);
- Parties are jointly and severally liable for arbitrators' fees (s 54(5)).
- Other important provisions in the Draft Bill includes:
- Acceptance of the principle of the severability of the arbitration clause in a contract from the rest of that contract is confirmed (s 26(1));
- The privacy of the arbitration hearing and the confidentiality of the arbitral process and the award are confirmed, subject to certain exceptions (s 34);
- A cooling-off period has been provided for arbitration agreements involving consumers (s 58);

PROPOSALS FOR REFORM

- Provisions to encourage and facilitate mediation between parties to an arbitration agreement have been included (ss 13-16);
- The description of what matters are arbitrable has been refined (s 5).

CONCLUSION AND RECOMMENDATIONS

- It has been 18 years since the Law Commission's Report on International Arbitration and 15 years since the Law Commission's Report on Domestic Arbitration and nothing has happened since with domestic arbitration.
- Adoption by Parliament of the new International Arbitration Act long overdue.
- It seems as if the main stumbling block in the promulgation of arbitration legislation based on the recommendations of the Law Commission based on domestic arbitration is political in nature.
- There is namely a fear that the adoption of arbitration legislation may, firstly, lead to a serious impediment for proper judicial transformation in South Africa and, secondly, that arbitration may be used by white parties to privatise litigation in an attempt to prevent black presiding officers from adjudicating over litigious matters in the courts.

CONCLUSION AND RECOMMENDATIONS

- In my opinion these fears are exaggerated.
- In the first place it is an economic reality that any country who wants to compete commercially on the global stage would have to have proper and advanced arbitration legislation dealing with not only international arbitration, but also domestic arbitration.
- Secondly, this would rather represent an ideal opportunity for transformation where non-white legal practitioners may be appointed as arbitrators in the existing arbitration tribunals.
- Thirdly, parties can in any event at present agree that their dispute be resolved by way of arbitration in terms of the current Arbitration Act.
- If parties for some or other reason therefore want to "privatise" their future litigation there would be nothing to stop them from doing so.

CONCLUSION AND RECOMMENDATIONS

- It is imperative that all the different stakeholders in the South African legal profession and trade industry get together as a matter of urgency to discuss the way forward relating to domestic arbitration and that appropriate legislation should be promulgated as soon as possible.
- In my opinion the arbitration process is still too much adversarial in nature and that the African element of *ubuntu* should also play a role in the adoption of new legislation.
- Recent decision on hate speech the court stated*: "Ubuntu is recognized as being an important source of law within the context of strained or broken relationships amongst individuals or communities and as an aid for providing remedies, which contribute towards more mutually acceptable remedies for the parties in such cases. Ubuntu is a concept which, inter alia dictates a shift from (legal) confrontation to mediation and conciliation"*

CONCLUSION AND RECOMMENDATIONS

- The con-arb system which has proved to be highly successful in labour matters may perhaps be an appropriate model in this regard.
- Parties to arbitration proceedings, with the assistance of the arbitrator, would therefore have to attempt to settle the matter first through conciliation, failing which the matter could be immediately converted into an arbitration.