***Ljuben Kocev****

# ARBITRABILITY OF COMPETITION LAW DISPUTES



**Abstract**

Throughout the years, the scope of arbitrability has been continuously expanding. There is a growing tendency to consider as arbitrable disputes which in the past fell within the exclusive jurisdiction of national courts. The competence of arbitral tribunals in handling competition law disputes has transpired as one of the most recent global trends, albeit not an entirely uniform one. As a result of the legitimate public interest of states to promote fair market competition and prevent disruptive market actions, competition and antitrust disputes have long been considered to be in the exclusive domain of national courts. Regardless of whether the parties have chosen arbitration as a mechanism for solving dispute which has arisen or might arise, in the past courts were reluctant to allow the parties to bring forth competition disputes to any forum other than state courts. However, through several landmark decisions in the USA and the European Union this rigid stance has been challenged. The main contention is whether, and to what extent can arbitration be considered just as a "switch of venue" and to what extend do arbitrators have the power to decide such disputes. From the arbitrators' point of view, it is important to assess whether the dispute can be resolved by arbitration i.e. whether the dispute would be arbitrable under the applicable law, and whether the rendered award would be open for challenges and setting aside further down the road. There are situations where public policy dictates dispute to be brought before a national court, but in all other cases an individual assessment needs to be made.

Unlike the rest of the world where there is an emerging trend to consider competition law disputes as arbitrable to some extent, in the Republic of North Macedonia there isn't any guidance as to whether these types of disputes might be submitted to arbitration. As a result, a careful evaluation of the existing laws is required to understand the underlying principles and interests of the stakeholders and assess whether in the current legislation there is a mechanism that would allow for such disputes to be resolved by arbitration.

The article aims to examine the possibility of arbitrating antitrust/ competition law disputes. It aims at making an overview of jurisdictions in which there is a tendency to allow such disputes to be resolved by arbitration and through the use of comparative analysis to highlight the differences which exist in those jurisdictions concerning the subject matter which can be subjected to arbitration. It further seeks to evaluate whether the stance taken in other jurisdictions concerning these types of disputes can be reflected within the laws of the Republic of North Macedonia.

**Keywords:** competition law, antitrust, arbitrability, objective arbitrability, international arbitration.

* Ljuben Kocev, LL. M, Ph.D. Student, Teaching and Research Assistant, Ss. Cyril and Methodius University in Skopje, Faculty of Economics, e-mail: ljuben.kocev@eccf.ukim.edu.mk

# I. INTRODUCTION

In today's business environment, international arbitration has become a powerful mechanism for resolvement of disputes between business entities. When compared to other alternative dispute resolution mechanisms, arbitration by its nature is closest to the adjudicative process of litigation. However, bearing in mind that international arbitration is a method for dispute settlement where the state renounces the power of its courts by allowing the parties to submit their dispute(s) to be resolved by a private body in "quasi-judicial" process, there is a need to exclude the possibility for a certain type of disputes to be resolved by any other mechanism beside state courts. These disputes would be then considered to fall within the exclusive domain of state courts. Today, there is a wide consensus that the vast majority of commercial disputes are capable of being settled by arbitration (contracts for sale of goods, services, distribution agreements, M&A agreements etc.). Additionally, there is also a consensus that criminal law cases cannot be in any way submitted to arbitration. Between these two extremes, there is a wide range of type of disputes for which currently there is a lack of consensus regarding their suitability to be resolved by arbitration.

This leads to the most prominent question in international commercial arbitration, i.e. the question of arbitrability. Arbitrability is the question of whether certain disputes can be resolved by arbitration.[1] Today, there is a growing tendency to consider disputes as arbitrable which in the past fell in the exclusive jurisdiction of the state courts.[2] For example, intellectual property rights disputes were considered for a long time as inarbitrable, whereas today not only has the position been reversed, but even more, the World Intellectual Property Organization (WIPO) has established its Arbitration and Mediation Center (WIPO – Center), whose main goal is to facilitate the dispute resolution process in the field of IP.[3]

The question on arbitrability of competition law disputes has emerged as one of the latest trends, however, there are diverging opinions. As a result of the legitimate public interest of states to promote free-market competition, and to have complete control over the market conducts, competition law disputes were for a long time considered to be in the exclusive jurisdiction of state courts. Even though the parties had explicitly chosen arbitration as a dispute resolution mechanism, courts were reluctant to allow such disputes to be resolved by forums different from state courts. However, through several landmark decisions by U.S courts, and the ECJ, which prompted changes in national legislations, concessions have been made from this rigid approach.

The focus of this paper is to explore the possibility of resolving competition law disputes through international commercial arbitration. The aim is to provide an overview of the states which tend to regard competition law disputes as arbitrable and through comparative analysis to highlight the interpretation in those jurisdictions related to the subject matter of the competition law disputes which can be resolved through international arbitration. In doing so, the motive is to explore whether the solutions and interpretations adopted in these jurisdictions can be reflected in the national legislation.

[1] Born G., International Commercial Arbitration, Kluwer Law International, 2014, pg. 944.

[2] Gaillard E., Savage J., Fouchard Gaillard Goldman on International Commercial Arbitration, Kluwer Law International, 1999, pg. 337.

[3] Woller M., Pohl M., IP Arbitration on the Rise, Kluwer Arbitration Blog, 2019, available at http://arbitrationblog.kluwerarbitration.com/2019/07/16/ip-arbitration-on-the-rise/.

## II. THE CONCEPT OF ARBITRABILITY

An arbitration agreement is a contract in which the parties agree to submit their future or existing disputes to be settled by arbitration. At the same time, with the arbitration agreement, the parties forfeit the option to submit those disputes for settlement in front of state courts. However, given the fact that judicial protection is a default mechanism that is guaranteed by the constitution,[4] the parties must know when, and under which conditions can they "opt-out" of the default dispute settlement mechanism and choose arbitration instead. The conditions which must be met that would allow the parties to conclude a valid arbitration agreement define the concept of arbitrability. The concept of arbitrability sets the limits, or boundaries in which the parties can freely conclude arbitration agreements. It is important to be noted that each state, on the principle of its sovereignty, has the power to set the limitations to the arbitrability under the prevailing public policy in a given period.[5]

In its essence, arbitrability can be defined as the possibility for the parties to decide their dispute do be resolved by arbitration.[6] However, a difference should be made between domestic and international commercial arbitration, and many states have adopted different laws depending on the character of the arbitration. Under the law of the Republic of North Macedonia, international arbitration is regulated within the Law of International Commercial Arbitration (LICA),[7] whereas domestic arbitration is regulated within the Law on Civil Procedure.[8] In this paper the focus will be on international commercial arbitration, primarily due to the increased internationalization of business relations and the supranational effect that competition law agreements have. Additionally, when considering public policy as an important factor in the evaluation of arbitrability of competition law disputes, it has to be further emphasized that a distinction is made between domestic and international, and to some extent transnational public policy.[9] Namely, there are countries which explicitly distinguish national from international public policy,[10] and construe the international public policy in much narrower confines.[11] In light of this, arbitrability of competition law disputes is can be more easily established in international arbitration, and then maybe transcended within the scope of domestic arbitration.

Arbitration is a dispute settlement mechanism that is contractual, and it is an embodiment of the principle of party autonomy. Therefore, arbitrability can also be defined as a possibility for the parties to conclude a contract in which the power to resolve certain disputes will be transferred from state courts to private bodies i.e. arbitral institutions. From this we can

---

[4] In the Republic of North Macedonia, judicial protection is guaranteed under Article 50 of the Constitution.

[5] Dempegiotis S., EC competition law and international commercial arbitration: A new era in the interplay of these legal orders and a new challenge for the European Commission, Global Antitrust Review, 135, 2008, pg. 138.

[6] Zoroska – Kamilovska T., Arbitrazno Pravo, Faculty of Law Iustinianus Primus, Skopje, 2015, pg.89.

[7] Law on International Commercial Arbitration (Official Gazette of the Republic of Macedonia no. 39/06). According to Article 1, arbitration is international if:

1) at least one of the parties, at the time of the conclusion of the arbitral agreement, is a natural person with domicile or habitual residence abroad, or a legal person whose place of business is abroad; or

2) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected.

[8] Law on Civil Procedure (Official Gazette of the Republic of Macedonia no. 79/2005, 110/2008, 83/2009, 116/2010 and 124/2015).

[9] Moses M., "Public Policy: National, International and Transnational", Kluwer Arbitration Blog, 12 November 2018, available at http://arbitrationblog.kluwerarbitration.com/2018/11/12/public-policy-national-international-and-transnational/. (accessed on 09.11.2019)

[10] For example, the Colombian Supreme Court made such a distinction in the case Tampico Beverages Inc. v. Productos Naturales de la Sabans S.Z. Alqueria.

[11] Moses, Op. Cit. 10

distinguish two types of arbitrability: subjective and objective.[12] Subjective arbitrability is the ability of individuals to enter into arbitration agreements, while objective arbitration refers to the ability of the subject matter to be settled by arbitration. Thus, subjective arbitrability answers the question of who can conclude an arbitration agreement, while objective arbitrability answers the question of which types of disputes may be submitted to arbitration.[13]

### *1.1 Subjective arbitrability*

The subjective arbitrability (rationae personae) refers to the ability of the parties to conclude an arbitration agreement or to be a party to the arbitration proceedings. The general rule of contract law is that the contracting parties need to have legal capacity[14], i.e. capacity to engage in a particular undertaking or transaction.[15] For physical persons this is connected with reaching a certain age, most prominently 18 or 21 years. For legal persons their legal capacity is related to their entry into the appropriate commercial registry. The representation in the transactions on behalf of the legal person is performed by the legally authorized representative.

Regarding physical persons who have a legal capacity as well as legal persons established as companies, it is widely acknowledged that they can conclude arbitration agreements and be parties to arbitration proceedings without any limitations.[16] What is debatable is to what extent states, as well as state-owned entities, can conclude arbitration agreements and appear as parties to arbitration proceedings. In different national legislations there are various restrictions on the ability of states, state-owned or state-controlled entities to appear as parties to arbitration, as well as to what types of disputes these persons may be subject to.[17] However, such restrictions constitute an exception to the general rule that there should be no restrictions regarding persons (natural or legal) that can conclude an arbitration agreement and be a party to arbitration proceedings.[18]

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards from 1958 (New York Convention)[19] does not contain explicit provision referring to the question of who has the capacity to conclude and arbitration agreement. However Article I(1) provides:

> *"This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal."*[20]

Accordingly, the wording of Article I(1) which explicitly refers to *"differences between persons, whether physical or legal"* and more specifically the structure of the wording leads to the conclusion that all persons, including states, state agencies, and state-owned entities should be considered to have the capacity to conclude arbitration agreements.

---

[12] Deskoski T, Megjunarodno Arbitrazno Pravo Faculty of Law Iustinianus Primus, Skopje, 2016, pg.149.
[13] Ibid.
[14] Law on Obligations (Official Gazette of the Republic of Macedonia no. 18/2001, 78/2001, 04/2002, 59/2002, 05/2003, 84/2008, 81/2009 and 161/2009), Article 48.
[15] Definition of legal capacity, Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary/legal%20capacity, (accessed 10.11.2019).
[16] Zoroska Kamilovska Op. Cit 7 pg. 98, Deskoski Op. Cit. 13 pg. 150.
[17] Deskoski Op. Cit. 13 pg. 151-161.
[18] Zoroska Kamilovska Op. Cit 7 pg. 98, Deskoski Op. Cit. 13 pg. 161, Stanivukovic M., Merodavno pravo za arbitrazni sporazum, Pravni Zivot, No. 12, 1998, pg. 317.
[19] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards from 1958 (New York Convention), is the most successful instrument on the recognition and enforcement of foreign arbitral awards. It has been ratified by 161 countries to this day. Information available at http://www.newyorkconvention.org/countries (accessed 15.12.2019)
[20] New York Convention, Article I(1).

The European Convention on International Commercial Arbitration from 1961[21] on the other hand explicitly regulates the question of subjective arbitrability. Article II titled "Right of Legal Persons of Public Law to Resort to Arbitration" explicitly provides that:

> *"[…]legal persons considered by the law which is applicable to them as "legal persons of public law" have the right to conclude valid arbitration agreements"*[22]

Similar standpoint has been accepted in the Macedonian Law on International Commercial Arbitration (LICA) were it is provided that:

> *"The Republic of Macedonia, legal persons controlled by the Republic of Macedonia, all the state agencies, and the units of self-government can be a party to international commercial arbitration."*[23]

Consequently, while there are some limitations regarding the power of states, and state authorities to conclude arbitration agreements, there is a growing tendency for abolishing these restraints. Additionally, when discussing the arbitrability of competition law disputes, the main theoretical discussion is focused on the objective arbitrability of the subject matter.

### *1.2 Objective arbitrability*

Objective arbitrability (rationae materiae) can be defined as the suitability of certain types of disputes to be resolved by arbitration. The most general rule is that disputes which do not fall within the exclusive jurisdiction of national state courts are to be considered as arbitrable. As already noted, by concluding an arbitration agreement, the parties waive their right to settle certain disputes in front of state courts and entrust the jurisdiction to third parties, i.e. private bodies - arbitration institutions. By allowing the parties to conclude arbitration agreements, the states willfully relinquish some of the competencies which fall within the scope of the judiciary authorities.

Nevertheless, for certain matters which are considered to be of significant importance, states may grant national courts exclusive jurisdiction. Disputes arising out of this subject matter would be considered as non-arbitrable.[24] Which types of disputes would fall within the exclusive jurisdiction of state courts, would depend on the social, the economic, and the political objectives of the state.[25] However, these objectives always have a temporal dimension. Globalization, trade and technology development lead to a constant shift in the perception of the most appropriate way of resolving commercial disputes. Under the influence of legal theory and case law, the concept of arbitrability has been continuously evolving, resulting in a situation in which disputes which were once in the exclusive domain of state courts, are now considered suitable for arbitration.

It is important to be noted that international conventions do not contain guidelines on which disputes should be arbitrable and which should not.[26] This distancing approach makes sense, given the fact that states, based on the principle of their sovereignty, have inherent power to determine which subject matter is of particular importance, and consequently disputes arising

---

[21] European Convention on International Commercial Arbitration, 21 April 1961, Geneva. To this date 31 countries are parties to this convention. Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en#8.

[22] European Convention on International Commercial Arbitration, Article II(1). It is also worth mentioning that form the parties of the convention, Belgium has declared that only the State (excluding other public entities) has the power to conclude arbitration agreements, Latvia has also made a similar declaration, which in 2013 has been withdrawn.

[23] Law on International Commercial Arbitration (Official Gazette of the Republic of Macedonia no. 39/06), Article 1(7).

[24] Halket T., Arbitration of Intellectual Property Disputes, Juris Net Publishing, New York, 2012, pg. 56.

[25] Redfern A., Hunter M., Redfern and Hunter on International Commercial Arbitration, Oxford University Press, Oxford, 2009, pg. 94.

[26] Deskoski Op. Cit. 13 pg. 162.

of that particular subject matter cannot be resolved through arbitration. The provisions which regulate the subject matter which falls within the exclusive jurisdiction of state courts set the limits of the objective arbitrability. These provisions have imperative character and as such there is an assumption that they form an integral part of the state's public policy. At the conceptual level, arbitrability and public policy conflict because expanding one concept inevitably lead to a reduction of the other. It is up to the states to find the right balance depending on the national objectives.

Typically, in the sphere of civil law, subject matter over which state courts would have exclusive jurisdiction include, among others, bankruptcy and insolvency proceedings, disputes related to registration of intellectual property rights, stock exchange and securities disputes, disputes related to company registration, accession, merger, division, and termination, and to some extent competition law disputes, which will be discussed in the following section of the paper. In the Macedonian national legislation, the concept of objective arbitrability is defined in the Law on International Commercial Arbitration. Article 1 of the LICA defines the ability of disputes to be resolved by international arbitration. Article 1 sets out two conditions which must be met for the subject matter of the dispute to be arbitrable:

1. The dispute should be concerning matters in respect of which the parties may settle;[27] and
2. The dispute should not be subject only to the jurisdiction of a court in the Republic of North Macedonia.[28]

Regarding the first condition, it should be noted that at first reading it seems that there is a difference regarding the English and the Macedonian version of the LICA. Namely, the wording in the Macedonian version seems to refer to "rights which can freely be disposed of by the parties." According to prof. Deskoski, to determine these rights, an interpretation of the Law on Obligations is necessary, in particular matters of which the parties can settle.[29] Accordingly the plain wording used in the Macedonian version should be considered as a synonym with disputes over which the parties can settle.[30]

Concerning the second condition, the central provision is Article 54 of the Private International Law Act (PILA), which provides that the courts of the Republic of North Macedonia are exclusively competent when expressly provided by law.[31] The PILA contains most of the provisions on the exclusive jurisdiction of state courts. In particular the PILA provides exclusive jurisdiction of state courts for disputes related to company registration, accession, merger, division, and termination,[32] disputes over the validity of the registration in public registries,[33] disputes related to the registration and validity of industrial property rights,[34] disputes over immovable properties,[35] and enforcement proceedings that are conducted on the territory of the Republic of North Macedonia.[36] Regarding these types of disputes, an arbitration agreement cannot be concluded and they cannot be subjected to arbitration.

[27] LICA Article 1(2).
[28] Ibid, Article 1(6).
[29] Deskoski Op. Cit. 13 pg. 172.
[30] Ibid.
[31] Private International Law Act (Official Gazette of the Republic of Macedonia no. 87/07 and 156/10), Article 54.
[32] PILA Article 65.
[33] Ibid., Article 66.
[34] Ibid., Article 67.
[35] Ibid., Article 69.
[36] Ibid., Article 68.

## III.ARBITRABILITY OF COMPETITION LAW DISPUTES

Competition law is a system of norms and regulations aimed at, detecting, preventing, and sanctioning restrictive agreements, decisions, or undertakings that violate the principle of free-market competition. Competition law supervises the conduct of all entities that appear on the market and establishes the boundaries in which they operate. Generally, competition law consists of unfair competition law and antimonopoly law.[37] Unfair competition law aims to prevent actions and agreements that distort market competition, while antimonopoly law is aimed at preventing the abuse of a dominant position by market subjects.

In today's political, economic, and social setting, the protection of the principle of free competition is considered one of the most important priorities and guarantees which states must provide. Within the EU, the principle of free market competition has been raised to the highest level, and as such the importance of protection of the free market competition has been implemented in the founding treaties.[38] In the Republic of North Macedonia, the principle of free market competition is incorporated in the Constitution as the highest act, which explicitly guarantees market freedom and promotion of entrepreneurship as one of the fundamental rights.[39] Article 55 of the Constitution requires the equal status of all market participants and the undertaking of all measures necessary against abuse of dominant position and restrictive practices.[40] The main legal source regulating competition law in the Republic of North Macedonia is the Law on Protection of Competition (LPC).[41] LPC establishes three forms of distortion of competition that might occur: contracts, decisions, and restrictive practices that restrict competition; abuse of dominant position, and control of concentrations.[42]

Competition law as a subject matter forms an integral part of states' public policy.[43] Additionally, competition law, or particularly the protection of the principle of the free market competition can be also considered as a matter of transnational public policy. Generally, there is a consensus that within the EU, competition law provisions relating to the single market form part of the community's public policy.[44]As such, competition law provisions are mandatory rules, i.e. norms whose application cannot be excluded or restricted.[45] Because of this, for long time competition law disputes were considered as non-arbitrable. The “unsuitability” of competition law disputes to be settled by arbitration stems from the tension between the imperative character of the provisions related to the free market competition (as part of public policy) on the one side, and the contractual nature of arbitration as an alternative dispute resolution mechanism (embodiment of the principle of party autonomy) on the other.

---

[37] Dabovic Anastasovska J., Pepeljugoski V., Pravo na intelektualna sopstvenost, Akademik, Skopje, 2012, pg. 36.

[38] This principle was incorporated in Article 85 and 86 of the Treaty of Rome from 1957, today incorporated into the Treaty of the Functioning of the EU, Articles 101 and 102 respectively.

[39] Constitution of Republic of North Macedonia, Article 55.

[40] Ibid.

[41] Law on Protection of Competition (Official Gazette of the Republic of Macedonia no. 145/10, 136/11, 41/14, 53/16 and 83/18).

[42] Pepeljugoski V., Konkurentsko Pravo, FON University, Skopje, 2009, pg.218.

[43] Szolc M., The EU Competition Law, and Arbitration – Is It Really a "War of the Worlds", available at https://www.academia.edu/24995945/The_EU_Competition_Law_and_Arbitration_Is_It_Really_a_War_of_the_Worlds_.

[44] Komninos A., Arbitration and EU Competition Law, University College London- Faculty of Laws, 2009, достапно на: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1520105, pg. 36.

[45] Ibid.

However, when discussing the arbitrability of competition law disputes, several distinctions should be made. Primarily, it is important to be noted that there is a distinction between the types of disputes that might occur which may trigger competition law. Namely, it is necessary to distinguish between cartels or monopolies on the one hand and ordinary commercial contracts on the other. Cartels are illicit agreements between several market players who join together primarily for price-fixing, restriction of production or market fragmentation, while monopolies are market structures where market conditions are unilaterally imposed. In stark contrast, there are ongoing commercial contracts that companies conclude as part of their daily business activity. These may be sales, distribution, licensing, or franchise agreements which may indirectly give rise to competition law issues.
Both types of conducts may give rise to competition law issues, however, the degree to which they will affect the market competition and restrict free trade differs significantly:

- With cartels and monopolies (as abuse of dominant position) direct harm is inflicted on all market players and consumers, whereas in ordinary commercial contracts direct harm is inflicted on the other contracting party, while the consumers may be affected indirectly.
- With cartels and monopolies, the inflicted harm and the distortion of the market are certain, predictable and foreseeable, whereas ordinary commercial contracts do not necessarily cause harm to consumers as in many situations the harm will be absorbed by the damaged contractual party, and will not be transferred further into the supply chain.
- In cartels, the interests of the undertakings are aligned since it is their economic interest to continue with the illicit conducts and practices, whereas in ordinary commercial contracts there are conflicting interests between the parties, and therefore the interest of the aggrieved party would by default be aligned with the interest of the consumers.
- With cartels and monopolies there is always a violation of statutory provisions, whereas, in ordinary commercial contracts, the violation would be primarily of a contractual term, and it would have to be evaluated whether there is also a breach of a statutory term.
- In cartels, there are no formal agreements between the undertakings, and consequently there can be no arbitration agreement. In ordinary commercial contracts, there is a formal written agreement that contains a valid arbitration clause.

In arbitral proceedings, competition law issues usually arise as ancillary issues in a dispute arising out of a licensing, distribution, or franchise agreement incorporating an arbitration clause. In these situations, a dispute often arises because of a breach of contractual obligation, and the defendant will, in response, raise an objection of non-arbitrability based on provisions violation competition law.[46] Accepting the standpoint that any dispute that gives rise to competition law issues would be non-arbitrable gives rise to a serious problem, as it would enable the defendants to easily sabotage and obstruct the proceedings. On the other hand, disputes may indeed have more serious implications for the free market competition and in certain states would be considered as non-arbitrable.
However, there is another important consideration that has to be taken into account when evaluating the arbitrability of competition law disputes. Namely, the fact that competition law forms part of the public policy would not make competition law disputes inarbitrable by default. Even though the public policy is given a pivotal role in the discussion regarding arbitrability, the fact that public policy might be at stake does not mean that the dispute can be resolved solely by national courts. This interpretation can be deducted from the following.

[46] Komninos, Op. Cit., 45, pg. 6.

Firstly, the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration[47] recognize both the non-arbitrability and violation of public policy as separate grounds for setting aside,[48] or denial of recognition and enforcement of a foreign arbitral award.[49] Secondly, the explicit wording on the provisions referring to public policy stipulates that an award can be set aside if it "is in conflict with the public policy of the state", or it can be denied recognition and enforcement if that "would be contrary to the public policy of that country". Accordingly, countries' public policy can be violated even if the subject matter of the dispute is arbitrable. By *argumentum a contratio* arbitrators are not precluded from applying provisions that might have public policy implication in either of the countries which might have a connection with the dispute. Rather, it becomes a question of the matter in which arbitrators apply those provisions, i.e. whether the (miss)application of these provisions might put into question the future of that award. The wording in the New York Convention and the UNCITRAL Model Law seem to support this standpoint.

In times of open markets and business internationalization, the ventures and conduct of market participants can affect many countries and consequently in a large number of markets. In such cases, it is important to assess whether the dispute can be resolved through arbitration, i.e. whether the dispute will be considered arbitrable under the applicable law, or is there a possibility for the arbitration award to be set aside, or denied recognition and enforcement. Bellow an overview is given of the states where competition law disputes are considered to be arbitrable, before addressing the current legal framework in the Macedonian national legislation.

## IV. COMPARATIVE OVERVIEW OF ARBITRABILITY OF COMPETITION LAW DISPUTES

As already pointed out, the limits of arbitrability are set at the national level. It is up to the states to determine which disputes can be resolve through arbitration and which disputes fall under the exclusive jurisdiction of the state courts. The conceptualization of arbitrability on the national level leads to states adopting different positions on this issue. Therefore, we make a brief comparative overview of how this issue is regulated in the United States, the EU, some of the EU member states, and Switzerland.

As is the case in many other areas of law, the USA is one of the first states to recognize that competition law disputes can be resolved through arbitration. Until the mid-1980s there was an opinion that competition law was entirely in the domain of national courts. In the case of *American Safety Equipment Corp. v. J.P. McGuire & Co*, the court explicitly stated in the judgment that antitrust disputes were inadequate to be settled by arbitration.[50] A turning point was the case of *Mitsubishi Motors v. Soler Chrysler-Plymouth*, where the US Supreme Court ruled that antitrust (competition) law disputes are arbitrable if there is a foreign element to the disputes.[51] The court found that not only contractual obligations but also statutory obligations

[47] UNCITRAL Model Law on International Commercial Arbitration (1985). The Model law is not legally binding itself, however, it is the most widely accepted model for drafting international commercial arbitration laws. To date, a total of 74 states have based their laws on this model law. Information is available at http://internationalarbitrationlaw.com/74-jurisdictions-have-adopted-the-uncitral-model-law-to-date/ (last accessed 01.09.2019).

[48] Ibid., Article 34.2.(b)(i) and Article 34.2.(b)(ii).

[49] New York Convention, Article V.2.(a) and Article V.2.(b).

[50] American Safety Equipment Corp. v. J.P. McGuire & Co., 391 F.2d 821, 825 (2nd Cir. 1968).

[51] Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 105 S. Ct. 3346 (1985). A brief overview of the facts of the case:

> Companies from Japan (Mitsubishi) and Puerto Rico (Soler) concluded an exclusive distribution agreement for the territory of Puerto Rico. The agreement contained an arbitration clause stipulating

can be submitted to arbitration. According to the court, arbitrators as well as judges have the necessary qualifications and knowledge to be able to decide competition law disputes. In this respect, the court made a somewhat oversimplified statement that arbitration should be considered simply as a "change of venue".

However, it is important to note that the court did not blindly entrust the power to the arbitrators by eliminating the control of the state courts, but found that the control should be shifted to the post-arbitration stage. In this way, the court created the so-called "second look" doctrine under which national courts can “decide for the second time” or “have a second chance" on reviewing the proper application of competition law matters, in proceedings for annulment of an arbitral award, or in proceedings for recognition and enforcement of a foreign arbitral award. The Supreme Court expressed confidence and gave power to the arbitrators, but at the same time entrusted them with the responsibility for proper application of competition law provisions, on the condition of the validity of the arbitration award.

In the EU, the positive attitude towards the arbitrability of competition law disputes was adopted almost two decades later. The most notable case is the *Eco Swiss China Time Ltd v Benetton International NV* from 1999.[52] In this case, the Supreme Court of the Netherlands submitted to the European Court of Justice (ECJ) the following questions for a preliminary ruling - should arbitration tribunals ex officio pay attention to the application of Article 85 of the EC Treaty (101 TFEU),[53] and whether the national courts may set aside an arbitration award if they find it to violate EU competition rules. The ECJ has found that when deciding on matters of EU competition law it is necessary to ensure the highest level of protection and applicability of the provisions, and that a mechanism for reviewing these matters is therefore necessary. According to the court, if an arbitral award is contrary to Article 85 of the EC Treaty (101 TFEU), member states may set aside the award on the ground that it violates public policy. The ECJ has thus acknowledged that the competition law provisions are an integral part of the public policy of the member states and the EU community at large.

Although the ECJ did not directly address the question of whether competition law disputes are arbitrable and did not explicitly state that this type of disputes can be resolved through arbitration, according to commentary, a thorough interpretation of the rationalization and argumentation of the ECJ decision would undoubtedly lead to a positive conclusion.[54] Such a conclusion seems justified given the fact that the ECJ in its decision echoes the need for an

---

> that all disputes would be settled by arbitration in Tokyo under the rules of the Japan Commercial Arbitration Association (JCAA). After a breach of the contract, Mitsubishi filed a lawsuit in the U.S. federal district court (as a district court for Puerto Rico) seeking a court order to compel Soler to go to arbitration, while Soler sought from the court to declare the arbitration agreement null and void as the dispute had an impact on U.S. competition law and as such is inappropriate to be settled through arbitration.

[52] Eco Swiss China Time Ltd v Benetton International NV, Case C-126/97. A brief overview of the facts of the case:

> The companies entered into a licensing agreement containing an arbitration clause stipulating that the disputes would be settled by the Netherlands Arbitration Institute. The contract was terminated and in the arbitration proceedings it was determined that one party was entitled to compensation for the wrongful termination of the contract. The losing party then commenced proceedings for setting aside the award on the ground that there had been a violation of EU competition rules, therefore the tribunal did not have the power to decide the case, and consequently the award had to be declared null and void. The Dutch Supreme Court has asked for a preliminary ruling by the European Court of Justice.

[53] Current Article 101 of the Treaty on the Functioning of the European Union (TFEU).

[54] Rogers C., Landi N., Arbitration of Antitrust Claims in the United States and Europe, Bocconi University, Institute of Comparative Law "Angelo Sraffa”, 2001, pg. 4; Richmond F., 'Arbitrating Competition Law Disputes: a matter of policy?', Kluwer Arbitration Blog, February 9 2012, available at http://arbitrationblog.kluwerarbitration.com/2012/02/09/arbitrating-competition-law-disputes-a-matter -of-policy/; Blanke G., Nazzini R., Arbitration and ADR of Global Competition Disputes: Taking Stock (Part III), Global Competition Litigation Review, Thomspon Reuters, Issue 3, 2008 pg. 136.

efficient mechanism for post-arbitration control over issues related to EU competition law. Therefore, if a control mechanism is provided for the proper application of EU competition law by arbitrators in the first place, it is logical to consider competition law disputes to be arbitrable.

Apart from the regulation at the EU level, the issue of arbitrability of competition law disputes is also regulated in the national laws of the member states. Some member states have accepted the arbitrability of competition law cases through changes in the legislation, while others have accepted it through case law. In Germany, with the amendments of the Act against Restraint of Competition, competition law disputes are considered arbitrable within the meaning of Article 1030 of the Arbitration Act, which forms an integral part of the Code of Civil Procedure.[55] In Italy, the arbitrability of competition law disputes has been confirmed by case law. The Bologna Court of Appeal is the first court to have ruled that commercial disputes involving competition law matters are considered to be arbitrable.[56] In France, the Paris Court of Appeal in the case of *Société Aplix v. Société Velcro* from 1993, determined for the first time that arbitrators may apply provisions of EU Competition Law and assess whether either of the parties has committed a statutory violation.[57] Although several years later, the United Kingdom has also accepted the arbitrability of competition law disputes througa h judgment of the High Court of England and Wales in the ca ofse *ET Plus SA* from 2005.[58]

Competition law disputes are considered arbitrable in non-EU states as well, such as Switzerland, where the Supreme Court ruled in 1992 that arbitrators in the same waaske judges have the power to decide on competition law disputes.[59] Regarding Switzerland, it is interesting that in a decision from 2006 the Supreme Court found that there is no longer room for doubt that the competition law provisions are no longer part of the public policy of the state, as they "do not pertain to the essential and broadly recognized values which should be the basis for any legal system.[60] This view of the Supreme Court is completely contrary to the ECJ's position on the matter, according to which the provisions of competition law form an integral part of the EU and its member stat'es policy.

From this brief comparative overview, it is noticeable that the United States, the European Union, as well as most developed countries within the EU and in Europe accept that competition law disputes are arbitrable. This trend is spreading to other countrieinof the world as well. In the following section we will give an overview of the legal provisions ithe n national legislation of the Republic of North Macedonia.

## V. ARBITRABILITY OF COMPETITION LAW DISPUTES IN REPUBLIC OF NORTH MACEDONIA

The main source for determining the arbitrability oa f certain type of dispues in the Republic of North Macedonia is the Law on International Commercial Arbitration

[55] Article 2 of the Arbitral Proceedings Reform Act, Book 10 of the Code of Civil Procedure, states that Section 91 of the Act on Restraints of Competition is repealed, thereby the restrictions on the arbitrability of cartel disputes are abolished.

[56] Bologna Court of Appeal decision of 19 July 1987, cited in Rogers and Landi, Op. Cit., 55, pg. 6.

[57] Société Aplix v. Société Velcro, Appeal Paris, 14 October 1993 [1994] Rev. Arb. 165.

[58] ET Plus SA & Ors v Welter & Ors [2005] EWHC.

[59] Rogers and Landi, Op.Cit., 55, pg. 7.

[60] Gillieron H.O., Marguerat J., Arbitration and Competition – A Swiss Perspective, Competition Policy International Antitrust Chronicle, July 2019, pg. 3, available t: https://www.froriep.com/upload/prj/publication/HGI-JEM_Arbitration-and-Competition-A-Swiss-Perspective.pdf.

(LICA)Concerningto the subjective arbitrability, as previously noted, LICA does not impose any restrictions, i.e. all natural and legal persons can ba e party to arbitration agreementsConcerningto the objective arbitrability, LICA sets the 2 requirements: disputes arising out of matter in respect of which the parties may reach a settlement and disputes for which there is no exclusive jurisdiction of the domestic courtsAboueto the question of exclusive jurisdiction, neither the LICA nor the PILA contas ain provisiothatch gisve exclusive jurisdiction of a national court in respect of competition law disputes. In terms of competition law, the *lex specialis* is the Law on Protection of Competition.

Article 6 of the LPC provides that the competent supervisory authority for the protection oe free trade is the Commission for the Protection of Competition (CPC).[61] The Commission for Protection of Competition controls the application of the LPtmof deteng conducts which violate the principle of free market competition.[62] Additionally, the CPC is the competent authority for misdemeanors in the area of competition law.[63] In the procedures conducted by the CPC, the Law on General Administrative Procedure should be applied, unless the LPC or the Law on Misdemeanors provides otherwise.[64] Finally, in the misdemeanor procedure the CPC renderfinal s decisioal.[65] However a legal action against those decisions can be brought forth in front of the competent state court, which is the Administrative Court to the Higher Administrative Court of the Republic of North Macedonia.[66]

From the evaluation of all the relevant provisionsomare argumench can both support and oppose the arbitrability of the competition law disputes. Namely, the fact that the CPC has exclusive jurisdiction in the control of the application of the LPC can be interpreted that arbitrators would not have the power to apply competition law. The CPC is also the competent body to apply the relevant law and render decisions. Similarly, in the recourse against those decisions, national state courts have exclusive jurisdiction, which can be interpreted that this woult exclude arbitral tribunals.

On the other hand, all these provisions explicitly provide that the procedures conducted by the CPC arn administrature and concern primarily the detection, preventi,on and sanction of actionthatch have an effect theon market as a whole. The "exclusive jurisdiction" of the Administrative Court is also onln regaingto recourse against decisions passed by the CPC, not an exclusive jurisdiction regarding all competition law disputes. As it was already noted, neither of the relevant laws doot explicitly grant exclusive jurisdiction to state courts in competition law disputes. These arguments would go in favor of acceptance of broader interpretation of the concept of arbitrability which would encompass competition law disputes as well.

Additionally, as it has been already pointed out, most often competition law issues would arise either as preliminary or ancillary questionconcerningto a dispute arising out of a breach of a licensing agreement, distribution agreement, technology transfer agreement, etc. In this case, the main question that arises before the arbitral tribunal is whether one of the parties has breached a contractual obligation. The competition law issue will be raised as a defense by the respondent, or the party which refuses to comply, by invoking nullity of the arbitration clause, on the bases of inarbitrability of the subject matter of the dispute. In such a situatioer for the arbitrators to decide objectively whether or not a party has committed a contractual breach, they would first need to determine whether there is indeed a breach of competition

[61] LPC, Article 6.
[62] Ibid, Article 28(1).
[63] Ibid, Article 30.
[64] Ibid, Article 31.
[65] Ibid, Article 46.
[66] Ibid.

law. Deciding on the main issue will become inextricably bound with the decision on the competition law issue.
In such a situation, the issue of the objective arbitrability becomes crucial. As none of the relevant laws contains a provision imposing exclusive jurisdiction on a national court, the only question that remains is whether there is a dispute ovethe r subject matter in respect of which the parties maa settnt. This would depend on whether the dispute qualifies as a dispute for breach of contractual obligation having *inter partes* effect or a dispute for a breach of a statutory provision having *erga omens* effect. If it qualifies as a dispute where contractual obligationthatch have *inter partes* effect prevasil, then the arbitral tribunal should be free to decide on the question, regardle ofss whether there would be an investigation conducted by the CPC. If, however there is a dispute over the violation of a statutory provision, then the CPC is more likely to have an investigationEven thoug at proceedings ara differere, the arbitrators' decision-making can be problematic as there is a possibility that their and the CPC's decision may end up being conflicting. However, in such a situation, it would be possible, and it would be wiser, for arbitrators to wait for the final outcome of the CPC investigation before deciding within the arbitration proceedings.

## VI. CONCLUSION

In the modern business world, the predictability of commercial ventures is of the utmost importance for business entities. In this regard, as international commercial arbitration is fast becoming the preferred method of dispute resolution, the issue of arbitrability of competition law disputes is of particular importance since there is a growing number of commercial transactions which may have implications for competition law.
On a global scale, there is a tendency for expansion of the concept of arbitrability, and consequently a growing number of disputes which were traditionally in the exclusive domain of national courts, can now be put in the hands of arbitrators. This growing tendency also applies to competition law disputes, as the number of states that consider such disputes to be arbitrable is constantly increasing. The EU as a supranational organization, The USA, Germany, France, the United Kingdom and Switzerland have already established either through changes in the national legislation or through case law that disputes involving competition law matters can be resolved through arbitration.
On the other hand, in the Republic of North Macedonia, the issue of arbitrability of competition law disputel remains open for interpretation, and it is yet to be seen how the existing legislation will be interpreted in practice. Neither of the relevant laws such as the LICA, PI,LA and LPC contasin sufficient guidance that would give a definitive answer to this question. This absence of provisions that explicitly prohibit resolvement of competition law disputes through arbitration can be interpreted affirmatively, i.e that competition law disputes art arbitrable. Namely, as it has been already pointed out, most jurisdictions have accepted p-o arbitration stance when it comes to competition law disputes primarily through case law, and the majority of them do not have provisionthatch regulate this issue explicitly. However, at the same time the absence of case law where the issue of arbitrability has been raised, either before the state courts or arbitral institution, as an obstacle for givina g definite answer to this question.

**Bibliography**


1. Born G., International Commercial Arbitration, Kluwer Law International, 2014.
2. Blanke G., Nazzini R., Arbitration and ADR of Global Competition Disputes: Taking Stock (Part III), Global Competition Litigation Review, Thompson Reuters, Issue 3, 2008, pp. 133-147.
3. Dabovic Anastasovska J., Pepeljugoski V., Pravo na intelektualna sopstvenost, Akademik, Skopje, 2012.

4. Dempegiotis S., EC competition law and international commercial arbitration: A new era in the interplay of these legal orders and a new challenge for the European Commission, Global Antitrust Review, 135, 2008, pp. 135-148.
5. Deskoski T., Megjunarodno Arbitrazno Pravo, Faculty of law "Iustinianus Primus", Skopje, 2016.
6. Gaillard E., Savage J., Fouchard Gaillard Goldman on International Commercial Arbitration, Kluwer Law International, 1999.
7. Gillieron H.O., Marguerat J., Arbitration and Competition – A Swiss Perspective, Competition Policy International Antitrust Chronicle, July 2019, available t: https://www.froriep.com/upload/prj/publication/HGI-JEM_Arbitration-and-Competition-A-Swiss-Perspective.pdf.
8. Halket T., Arbitration of Intellectual Property Disputes, Juris Net Publishing, New York, 2012.
9. Komninos A., Arbitration and EU Competition Law, University College London- Faculty of Laws, London, 2009, available t: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1520105.
10. Moses M., "Public Policy: National, International and Transnational", Kluwer Arbitration Blog, 12 Novembr, 2018, available t: http://arbitrationblog.kluwerarbitration.com/2018/11/12/public-policy-national-international-and-transnational.
11. Pepeljugoski V., Konkurentsko Pravo, FON University, Skopje, 2009.
12. Redfern A., Hunter M., Redfern and Hunter on International Commercial Arbitration, Oxford University Press, Oxford, 2009.
13. Richmond F., 'Arbitrating Competition Law Disputes: a matter of policy?', Kluwer Arbitration Blog, February 9 2012, available t: http://arbitrationblog.kluwerarbitration.com/2012/02/09/arbitrating-competition-law-disputes-a-matter -of-policy/.
14. Rogers C., Landi N., Arbitration of Antitrust Claims in the United States and Europe, Bocconi University, Institute of Comparative Law "Angelo Sraffa", 2001.
15. Stanivukovic M., Merodavno pravo za arbitrazni sporazum, Pravni Zivot, No. 12, 1998, стр. 309-325.
16. Szolc M., The EU Competition Law and Arbitration – Is It Really a "War of the Worlds", available t: https://www.academia.edu/24995945/The_EU_Competition_Law_and_Arbitration_Is_It_Really_a_War_of_the_Worlds.
17. Woller M., Pohl M., IP Arbitration on the Rise, Kluwer Arbitration Blog, 2019, available t: http://arbitrationblog.kluwerarbitration.com/2019/07/16/ip-arbitration-on-the-rise/.
18. Zoroska Kamilovska T., Arbitrazno Pravo, Faculty of law "Iustinianus Primus", Skopje, 2015.

Legal texts

1. Constitution theof Republic of North Macedonia.
2. European Convention on International Commercial Arbitration, 1961.
3. German Arbitration Act of 1998, Book 10 of the Code of Civil Procedure.
4. Law on Civil Procedure (Official Gazette of the Republic of Macedonia no. 79/2005, 110/2008, 83/2009, 116/2010 and 124/2015).
5. Law on International Commercial Arbitration (Official Gazette of the Republic of Macedonia no. 39/06).
6. Law on Obligations (Official Gazette of the Republic of Macedonia no. 18/2001, 78/2001, 04/2002, 59/2002, 05/2003, 84/2008, 81/2009 and 161/2009).
7. Law on Protection of Competition (Official Gazette of the Republic of Macedonia no. 145/10, 136/11, 41/14, 53/16 and 83/18).
8. Private International Law Act (Official Gazette of the Republic of Macedonia no. 87/07 and 156/10).
9. The New York Convention on recognition and Enforcement of Foreign Arbitral Awards of 1958.
10. UNCITRAL Model Law on International Commercial Arbitration (1985).

Judicial Awards

1. American Safety Equipment Corp. v. J.P. McGuire & Co., 391 F.2d 821, 825 (2nd Cir. 1968).
2. Eco Swiss China Time Ltd. v. Benetton International NV., case C- 126/97.
3. ET Plus SA & Ors v Welter & Ors [2005] EWHC.
4. Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 105 S. Ct. 3346 (1985).
5. Société Aplix v. Société Velcro, Appel Paris, 14 October 1993 [1994] Rev. Arb. 165.
6. Tampico Beverages Inc. v. Productos Naturales de la Sabans S.Z. Alqueria.

Web pages

1. http://internationalarbitrationlaw.com
2. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en#8.

3. https://www.merriam-webster.com/dictionary/.
4. http://www.newyorkconvention.org/countries.