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RESTRUCTURING OF COMPANIES AND THEIR CONSEQUENCES IN RELATION TO EMPLOYEES:

Conditions, dilemmas and challenges in the Laws of the EU, Austria, Macedonia and Serbia

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For the Publisher

Prof. Dr. Goran Koevski
Dean of the Faculty of Law "Iustinianus Primus"

Editor-in-Chief

Prof. Dr. Todor Kalamatiev,
Faculty of Law "Iustinianus Primus"
Ss. Cyril and Methodius University in Skopje

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FOREWORD

ABOUT THE OeAD IMPULSE Project "Restructuring of Companies and the EU Law"

The International Project *"Restructuring of Companies and the EU Law"* (RoCEU) takes place in the period between 1st April 2016 – 31st March 2018. The project is supported by the Austrian Agency for International Cooperation in Education and Research (OeAD) as part of the New Cooperation Program for Higher Education – IMPULSE and is coordinated by the Research Institute of Central and Eastern European Business Law (FOWI) at the Vienna University (WU). FOWI has been engaged in a great number of research projects focusing on business law in CEE countries and established a reliable network of scholars in this region in the last 26 years.

Leading university in the "Restructuring of Companies and the EU Law" IMPULSE project is the Vienna University of Economics and Business (Wirtschaftsuniversität Wien – WU), while the other two partners in the project are the University in Belgrade (Faculty of Law) and the Ss. Cyril and Methodius University in Skopje (Faculty of Law "Iustinianus Primus").

The project aims at conducting a comprehensive research including *company and labour laws* on restructuring of companies from the perspective of the EU requirements. Only the combination of company and labour law can create the delicate balance between flexibility and security which is necessary to achieve the sometimes conflicting aims of economic growth and employment protection at the same time. In the *centre of the research* are

Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. Official Journal of the European Communities L 82/16.

Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer. Official Journal of the European Union L 283/36.

<http://www.businessdictionary.com/definition/merchandising.html>

Toni Deskoski,
Full Professor, Ss. Cyril and Methodius University in Skopje
Faculty of Law 'Iustinianus Primus'

Vangel Dokovski,
Assistant Professor, Ss. Cyril and Methodius University in Skopje
Faculty of Law 'Iustinianus Primus'

ARBITRATING CORPORATE DISPUTES – FOCUS ON EMPLOYMENT DISPUTES (from Macedonian perceptive)

A. Introduction into arbitrability of corporate disputes

The Paper was received on 30.10.2018
It was reviewed and accepted for publication

From a corporate perspective, there are several type of disputes: disputes involving economic interest, disputes not involving economic interests, disputes in partnerships, disputes between company and its organs and disputes in employment matters. Now, speedy and effective settlement of disputes (regardless of their nature) is a primary requirement for the smooth flow of trade at all levels – local, national and international. Today, arbitration is a very popular form of alternative dispute resolution, especially in commercial disputes. Among the various ADR mechanisms, arbitration is the closest in spirit to the adjudication process. Unlike other settings, the arbitrator is granted the authority to decide the case and deliver awards to the parties in dispute.[1]

Arbitration agreements can be found in many companies statutes to resolve any potential disputes arising between different playes. An arbitration clause included in a corporation's constitution gives providers of capital, directors, managers, employees, and stakeholders a gateway from national courts to neutral body. By the arbitration agreement, parties are free to tailor the procedural rules to their specific needs, without being bound by the strictures

1 R. Kuttner, "The Arbitrator as Leader and Facilitator: in Tony Cole , *The Roles of Psychology in International Arbitration*, International Arbitration Law Library, Volume, Kluwer Law International 2017, 96.

of civil procedure (by creation of specific rules – ex. DIS-Supplementary Rules for Corporate Law Disputes 09 (SRCoLD).

However it must be pointed out, that since arbitration is an alternative dispute resolution with public policy consequences, traditionally, and some types of disputes are reserved for exclusive court jurisdiction. Such disputes are in the field of bankruptcy, family law and criminal law. According to Redfern and Hunter each state may decide, in accordance with its own economic and social policy, which matters may be settled by arbitration and which may not.[2]

In arbitral proceedings, five fundamental principles underlie the process: the principle of party autonomy; the principle of separability; the principle of judicial non-intervention; *kompetenz-kompetenz*, and the principle of arbitrability.[3] Out of these five principles it seems that the principle of arbitrability is the most controversial one.

The analyzes of the principle of arbitrability it is generally done in three ways. Firstly, arbitrability may be determined by arbitral tribunal as case of jurisdiction; secondly, the courts of the seat of arbitration may be addressed for an injunction or declaration that a subject-matter is not arbitrable; thirdly, legal proceedings may be commenced on the merits of the dispute which will require the court to decide whether the dispute is arbitrable.[4] One can hardly deny is that the question of arbitratibility of corporate disputes has not been subject of much discussion and analysis. Thus, the authors of this text give an overview of the challenging question concerning the arbitrability of employment disputes in Republic of Macedonia.

This text analyses the boundaries of arbitrability of corporate disputes with focus on employment disputes in Republic of Macedonia by providing a

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

3 P. Obo Idornigie, The Principle of Arbitrability in Nigeria Revisited, Journal of International Arbitration 21(3) : 279–288, 2004, 279.

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

comparative overview of the current situation under the legal framework. Thus, objects of this article shall be the legal grounds for arbitrability of such disputes in Macedonia and why should parties opt in for arbitration of such disputes.

B. The Notion of Arbitrability

As arbitration is essentially the agreement of private parties to resolve a dispute, it follows that the legislature of a state can impose restrictions upon the category of disputes that can be submitted to arbitration. If a particular dispute falls within the subject matter of disputes that are allowed by the laws of a state to be submitted to arbitration, that dispute is said to be arbitrable as per the law of that state. Simply speaking, "Arbitrability is concerned with the question of whether a dispute is capable of settlement by arbitration under the applicable law".[5] Hence, in order for the arbitration agreement to be effective, it must be the result of the valid consent of the parties. However, it must also be lawful. This means, first, that the agreement must relate to subject-matter which is capable of being resolved by arbitration and, second, that the agreement must have been entered into by parties entitled to submit their disputes to arbitration. These considerations are referred to under the heading of arbitrability, and are founded upon the protection of the general interest. This is as opposed to the requirement of valid consent, which is intended to protect the private interests of the parties to the arbitration agreement.[6]

The problem of arbitratibily arises since there may be at least three different systems of law involved in the decision as to whether or not a particular dispute is arbitrable. Different legal systems contain different provisions with respect to arbitrability and the conclusion that they may

5 Vinay Reddy, V. Nagaraj, Arbitrability: *The Indian Perspective, Journal of International Arbitration* 19(2): 117–149, 2002, 121.

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

reach is not necessarily the same. Domestic legal systems govern, control, and enforce international arbitration in various ways. Most legal systems have laws on arbitration, known as *lex arbitrii*, which govern party autonomy to have recourse to arbitration, the arbitral procedure, the applicable law, and the validity and effects of arbitral awards. These laws also give to domestic courts, jurisdiction to control, assist, and enforce arbitration.[7]

In formal treatments of subject, arbitrability is typically divided into "subjective arbitrability" and "objective arbitrability".[8] Hence, a first distinction has to be made between subjective arbitrability – by reason of the quality if one of the parties, when this party is a State, a public collectivity or entity of public body; and objective arbitrability, by reasons of the subject matter of the dispute which has been removed from the domain of arbitrable matters by the applicable national law.[9] Thus, arbitrability is one of the issues where the contractual and jurisdictional natures of international commercial arbitration collide head on. It involves the page simple question of what types of issues can and cannot be submitted to arbitration and whether specific classes of disputes are exempt from arbitration proceedings.[10] According to Zoroska Kamilovska, the state cannot permit every dispute between the parties to be decided by arbitration, because the state in certain matters has the right to retain the exclusive court jurisdiction in order to protect the interests of third parties or to protect the public interest.[11]

In the legal theory, some authors perceive arbitrability as contractual, while others see as a judicial question. Karim Youssef deems the question of arbitrability as contractual. An *objective* notion, arbitrability is also the

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

8 Ibidem, 312.

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

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

11 See T. Zoroska Kamilovska, *Арбитражно право*, Skopje 2015, p. 90.

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

I. Subjective arbitratbility – in general

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

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

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

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

For example, national statues sometimes contain provisions which limit or exclude the submission of disputes to arbitration when the State or a public entity is a party. In some cases they prohibit the recourse to arbitration, either in whole or in part. In other cases, they subordinate the validity of the arbitration agreement concluded by a State or a public entity to the obtention of a prior authorization.[15]

II. Objective arbitrability – in general

Objective arbitrability is the characteristic *of* the most importance for a legal matter to be the subject of an arbitration agreement. If the subject matter of the dispute is not arbitrable, the award may be set aside. In other words, for an arbitration agreement to be enforceable, the subject matter hat to be arbitrable, that is, it has to be a subject that the state considers appropriate to be arbitrated.[16] In principle any dispute should be just as capable of being resolved by a private tribunal as by the judge of a national court. However, since arbitration is a private proceeding with public consequences, some types of disputes are reserved for national court proceedings are generally in the public domain. It is in the sense that they are not "capable of settlement by arbitration.[17]

Arbitration legislation or judicial decisions in many states provide that particular categories of disputes are not capable of settlement by arbitration, or "nonarbitrable." In some jurisdictions, this defense is referred to as "objective arbitrability," or "arbitrability *ratione materiae*," while, in other jurisdictions, it is termed the "nonarbitrability" doctrine. Both international arbitration conventions (including the New York Convention) and national law provide that agreements to arbitrate such "nonarbitrable" matters need

15 B. Hanotiau, The Law Applicable to Arbitrability, Singapore Academy of Law Journal, 2014, 875-876.

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

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

not be given effect, even if they are otherwise valid, and that arbitral awards concerning such matters also need not be recognized.[18]

Thus, "objective arbitrability", relates to whether the subject matter of the dispute may be validly submitted to arbitration or whether it belongs exclusively to the domain of the state courts. If the subject matter of the dispute is non-arbitrable, the arbitration agreement cannot confer jurisdiction upon the arbitral tribunal.[19] The rationale for this is that certain matters are considered to be so important to the operation of justice or the running of business that they are reserved exclusively to the control of the courts.[20] Each state decides which matters may or may not be submitted to arbitration in accordance with its own political, social and economic policy. Also, there are some limitation set by international law and international public policy. Schematically, we can describe three levels of sources of possible limitations:

1. National/unilateral limitations emanating from State law,
2. Supranational limitations emanating from regional or international statutes, e.g., European law and
3. Transnational limitations emanating from a common core of public policy as perceived by an arbitration (often called, following the suggestion of Lalive, truly international public policy).[21]

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

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

20 Tweeddale, K.Tweeddale, *Ibidem* 111.

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

1. *The Law Governing Arbitrability*

The non-arbitrability doctrine was frequently invoked during the 20th century. National courts concluded that a variety of claims were non-arbitrable, applying expansive, sometimes ill-defined, conceptions of public policy. More recently, courts in most developed jurisdictions have materially narrowed the non-arbitrability doctrine, typically applying it only where statutory provisions expressly require. In most instances, this has involved a limited set of "mandatory law" claims, which parties are not free to contract out of in advance and which fairly clearly require resolution in judicial or other specialized forums.[22]

Insofar as issues of arbitrability are concerned, there seems to be a consensus among international arbitration scholars and practitioners that different rules apply depending on whether the arbitrability question arises prior to or during the conduct of the arbitration proceedings, or after the rendition of the award, at the stage of its recognition and enforcement.[23] In particular, according to the principle of Kompetenz-Kompetenz, an arbitral tribunal is vested with the authority to decide upon its jurisdiction with respect to any given dispute. In making such a decision, it will review the respective arbitration agreement and it will consider general legal principles affecting its jurisdiction. This decision will inevitably include an assessment as to whether the dispute at hand is arbitrable. The arbitral tribunal's determination, however, is not necessarily final. It might be subject to judicial review. In a motion to set aside the tribunal's determination or during a challenge of the final award at the recognition and enforcement stage, a court may take a `second look' at the arbitrability of a particular matter.[24]

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

23 F. Emanuele and M. Molfa , *Selected Issues in International Arbitration: The Italian Perspective*, Thomson Reuters 2014, 21.

24 Patrick M. Baron and Stefan Liniger, A Second Look at Arbitrability, *Arbitration International*, Kluwer Law International 2003 Volume 19 Issue 1, 27.

The parties' choice of the seat of arbitration not only determines the law governing the proceedings, and sometimes the law governing the arbitration agreement, but it also generally governs the question of arbitrability. Because different jurisdictions may have different approaches to arbitrability, a tribunal faced with an arbitrability question must decide whether to apply the law of the seat, the law chosen by the parties, the law of the enforcing jurisdiction, or another law.[25] Most tribunals will apply the law of the place of arbitration. If the award is not considered arbitrable in the place of arbitration, it is quite likely that an award would be vacated by the court in that jurisdiction.[26] Under Article 34 (b) (i) of the UNCITRAL Model Law on International Commercial Arbitration, 1985/2006 (hereafter in: UNCITRAL Model Law). At the award enforcement stage, Article V (2) (a) of the New York Convention explicitly mentions that a contracting state may refuse enforcement of an award if "the subject matter of the dispute in not capable of settlement by arbitration under the law of that country". Clearly the law of the forum would apply to that analysis.[27]

2. *Arbitrability under the New York Convention*

Lack of arbitrability is a ground for refusing enforcement of an award under the New York Convention. Article V(2) (a) of the New York Convention contemplates a uniform rule of conflict addressing issues of arbitrability that may arise at the stage of recognition and enforcement of the award. Under this article "[r]*ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the dispute is not capable of*

25 M. Mosses, op. cit. , 68.

26 Ibidem, 68.

27 D. Lindsey, Y. Lahlou, The Law Applicable to International Arbitration in New York, in J. Carter and J. Fellas, *International Commercial Arbitration in New York*, Oxford University Press 2010, 25.

settlement by arbitration under the law of that country." Thus, at the stage of the enforcement and recognition of an arbitral award, issues of arbitrability must be dealt with under the *lex loci fori*. In other words, under article V (2) (a), the party resisting recognition and enforcement on an international arbitral award must demonstrate that the subject matter of dispute is not arbitrable in the place where recognition and enforcement are sought.[28] It is the law of the enforcement court that governs whether the dispute was arbitrable or not.[29] In contrast to this clear rule at the enforcement stage the New York Convention does not contain a rule as to what law governs the question of page arbitrability at the pre-award stage.[30]

Article V(2)(a) is a ground that a court may invoke ex officio and the delegates did so as to enable the courts of Contracting States to safeguard domestic laws on arbitrability. That is the rationale of this provision.[31] It is important to point out the permissive language in art. V(1) and (2). A court 'may' (therefore is not obliged to) refuse enforcement if one of the exceptions to the general rule favouring enforcement is satisfied. In other words, even where one or more grounds allowing refusal of enforcement is proven, the court enjoys residual discretion to enforce the award (*China Nanhai Oil Joint Service* (Hong Kong)). It is important to stress that, in some countries, the permissive 'may' in art. V is sometimes interpreted as having the meaning of a positive obligation not to enforce (BGH 2 November 2000). Nonetheless, the reading of art. V as only allowing refusal of recognition and enforcement of foreign arbitral awards in the presence of certain grounds without imposing an actual obligation to that effect must be preferred. Indeed, the permissive

28 J. Pierce, D. Cinotti, Challenging and Enforcing International Arbitral Awards in New York Courts, in J. Carter and J. Fellas, *International Commercial Arbitration in New York*, Oxford University Press 2010, 393.

29 G. Cordero-Moss, *International Commercial Contracts*, Cambridge University Press, United Kingdom 2014, 261.

30 J. Lew , L. Mistelis , et al., *Comparative International Commercial Arbitration*, Kluwer Law International; Kluwer Law International 2003, 188.

31 M. Paulsson , *The 1958 New York Convention in Action*, Kluwer Law International 2016, 221.

language appearing in the English version of art. V (using the word 'may') does not seem to clash with the other official versions of the Convention. The same permissive language features in the Chinese, Russian and Spanish versions. It is interesting to note in this respect that the French text does not seem to contain, at first sight, language as permissive as the English text. Indeed, the French text provides that recognition and enforcement 'seront efuses', i.e., shall be refused. Nonetheless the courts of France themselves seem to interpret art. V in line with the more permissive language adopted under the English version.[32]

Several commentators have expressed the view that Article V(2)(a) is tautological since its purpose and scope are already covered by the general public policy defence under Article V(2)(b). However, nonarbitrability derives from the exclusive jurisdiction of a national court. As such, subparagraphs (a) and (b) of Article V(2) call for two different types of scrutiny. The first pertains to the jurisdiction of a State authority, and constitutes an absolute procedural bar to the recognition of an arbitral award, irrespective of its findings. The second pertains to the merits, and sets standards to be respected by arbitrators and their awards.[33]

3. *Arbitrability in the UNCITRAL Model Law*

The inarbitrability of a dispute is a ground for annulment and for refusal of recognition and enforcement of arbitral award under the UNCITRAL Model Law. Inarbitrability is provided under art. 34 of the UNCITRAL Model Law, as an ex officio ground of annulment of an arbitral award. Article 34 (2) of

32 L. Mistelis, D.diPietro, New York Convention, Article V [Grounds to refuse enforcement of foreign arbitral awards] in Loukas A. Mistelis (ed), *Concise International Arbitration (Second Edition)*, 2nd edition Kluwer Law International 2015, 19.

33 H. Arfazadeh, Arbitrability under the New York Convention: the Lex Fori Revisited, *Arbitration International Volume 17 Number 1*, LCIA 2001, 86.

the UNCITRAL Model Law expressly provides that the courts at the place of arbitration may set aside an award if the matter is not arbitrable under the lex fori. Art. 36(1)(b)(i) UNCITRAL Model Law only permits the refusal of the recognition and enforcement of an arbitral award if the subject matter is not arbitrable under the laws of the recognizing state.

However, the Model Law does not provide for a definition of the scope of arbitrability, leaving this matter to the national legislators. Indeed model law countries set out different standards of arbitrability; accordingly, case law on this matter would depend on the national standards on arbitrability.[34] The group of disputes not capable of settlement by arbitration will vary from national law to national law, but will typically include matrimonial and family disputes, criminal matters, certain intellectual property disputes, and certain bankruptcy-related disputes.[35]

4. *Arbitrability under the national law*

Each state decides which matters may or may not be submitted to arbitration in accordance with its own political, social and economic policy. Some states allow any matter to be arbitrated which the parties may freely dispose of. This is the solution in Belgium, Italy, the Netherlands and Sweden. In others states, arbitrability is extended to all pecuniary claims (*cause de nature patrimoniale; vermogensrechtlicher Anspruch; pretesa patrimoniale*) – *e.g.*, Article 177(1) of the Swiss Statute on PIL, Article 1030(1) of the German ZPO and Article 582(1) of the Austrian Code on Civil Procedure. According to the last two mentioned laws, non-pecuniary claims are arbitrable as well,

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

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

if parties are capable of concluding a settlement upon the matter in dispute. These laws are an example of how a general tendency in both statutory and case law can enlarge the range of arbitrable disputes in such a manner.[36] In the arbitration theory and practice, there are several categories of dispute for which question of arbitrability arise:

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

In Germany, by defining the arbitrability, the national legislator determines conclusively the extent to which disputes are open to arbitration and at the same time reserves certain disputes to state court jurisdiction. However, in light of the broad scope of arbitrability under German law, § 1059 (2) No. 2 (a) ZPO, it is of little practical importance. Under the new law, most of the previously controversial questions of company law are now clearly arbitrable, as well as competition law and patent law issues. Not arbitrable are disputes concerning residential lease agreements which in case of a dual use of the rented property require, however, that the emphasis of use is on the residential part.[37] If we look into the Swiss CPIL pursuant to Article 177(1), a dispute relating to any economic interest can be the subject matter of arbitral proceedings, regardless of whether the substantive law governing the underlying contractual relationship relies on a narrower definition of "objective arbitrability". The arbitral tribunal does not have to inquire into the substance of the applicable substantive law in

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

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

order to determine whether a claim is arbitrable.[38] As for Serbia, the Serbian Law has explicitly defines that "*parties may agree to an arbitration for the resolution of a pecuniary dispute concerning rights they can freely dispose of, except for disputes that are reserved to the exclusive jurisdiction of courts*" (Article 5 of the Law). Accordingly, all pecuniary disputed that fall outside of the scope of courts' exclusive jurisdiction are deemed arbitrable.[39]

C. Arbitrability of Corporate and Employment Disputes – in a nutshell

I. In general

The determination of arbitrability of corporate disputes has been a debatable question in certain jurisdictions, considering the application of public policy considerations. When parties and their respective lawyers consider dispute resolution mechanisms for a corporate dispute, they first need to determine whether the dispute is arbitrable or not. As a general rule, corporate disputes are arbitrable. In corporate disputes, there is no need to protect individuals or to deprive them of the disposition of claims as a consequence of a state monopoly on judicial power. Shareholder resolutions in commercial companies involve an economic interest. Consequently, disputes arising from them are arbitrable. The actual, practical problem lies in the drafting of the arbitration clause. The submission of this kind of corporate dispute to arbitration requires a specifically drafted arbitration clause that is adapted to the characteristics of the situation at hand.[40]

Kluwer Law International 2015, 411.

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

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

40 R. Trittmann I. Hanefeld, Part II: Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure), Chapter II: Arbitration Agreement, § 1030 – Arbitrabilityin Karl-Heinz Böckstiegel , Stefan Michael Kröll , et al. (eds), *Arbitration in Germany: The Model Law in Practice (Second Edition)*, 2nd edition Kluwer Law International 2015) 101.

II. Legal framework in Republic of Macedonia

In Republic of Macedonia under the dualistic approach, there is a difference between domestic and international arbitration in Macedonia. Domestic arbitration is regulated by the Law on Civil Procedure (see chapter 30 of this Law - procedure in selected courts), [41] while International Commercial Arbitration is regulated by the Law on International Commercial Arbitration from 2006.[42] 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.[43]

Article 1 (2) (6) of the Law on International Commercial Arbitration set the limits of the objective arbitratbility: ... "The international commercial arbitration, resolves disputes concerning matters in respect of which the parties may reach a settlement"[44]... and "this Law shall not affect any other law of Republic of Macedonia by virtue of which certain disputes may be subject only to the jurisdiction of a court in the Republic of Macedonia".[45] Thus, all pecuniary disputes that fall outside the scope of courts' exclusive jurisdiction are deemed arbitrable. For example, parties cannot agree on arbitration for their family or succession disputes since parties are not allowed to freely dispose with their rights. As for the exclusive jurisdiction, such type of jurisdiction is regulated by the Private International Law Act. For example, the court of the Republic of Macedonia shall have exclusive jurisdiction over disputes relating

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

42 Official Gazette of Republic of Macedonia, no 39/2006.

43 See Article 3 (1) of the Law on International Commercial Arbitration.

44 See Article 1 (2) of the Law on International Commercial Arbitration.

45 See Article 1 (6) of the Law on International Commercial Arbitration.

to establishment, dissolution and changes in the legal status of a company, of another legal person, or of an association of natural or legal persons, as well as in disputes relating to validity of resolutions passed by the bodies thereof if such company, another legal person or association has the principle place of business in the Republic of Macedonia. [46] Similar situations would arise in the context of IP rights related to their existence and validity, if the application was filed in the Republic of Macedonia.[47]

As for the domestic arbitration, similar provision is contained in article 441 of the LCP. Under this article, disputes without international element on the rights at free disposal of parties can be settled in the permanent selected courts, founded by the chamber of commerce and other organizations anticipated by law, unless the law determines that certain types of disputes shall be exclusively decided by another court.[48]

The answer to the question of arbitrability of empoyment disputes in Republic of Macedonia nneeds to be given under the double test for arbitrability – 1. Are empoyment disputes, disputes over the rights at free disposal of the parties and 2. Is there exclusive jurisdiction for this type of disputes? The test is successfully passed since empoyment disputes are disputes over the rights at free disposal of the parties and there is no exclusive jurisdiction under the PIL Act. As the test is a positive one, the employment disputes can be settled by arbitration.

III. Specific types of labor arbitration in Republic of Macedonia

If we look into the substantive law in Republic of Macedonia, we can identify some articles that have opened the door for specific types of corporate and employment disputes. Under article 41 from the Law on Trade Companies,

46 See Article 65 of the Private International Law Act, Official Gazette of Republic of Macedonia, no. 87/2007, 156/2010.

47 See Article 67 of the Private International Law Act.

48 See Article 441 of the Law on Civil Procedure.

shareholders, and, the shareholders of the company, may agree to settle the disputes related to the contract for the company, or, the statute, amicably, including mediation and negotiation. If the dispute cannot be settled amicably, it can also be settled by arbitration if they agree. [49]

As for the labor arbitration, the question of aribtrability of employment disputes is already settled by a specific type of labor arbitration under the Law on Labor Relations. In these sense, we are talking about a very specific type of domestic arbitration. In case of an individual or collective labor dispute, the employer and the employee may agree to entrust the settlement of the dispute to a particular body established by law.[50]

The law that established such type of bodies is Law on Amicable Settlement of Employment Disputes (LASEM). In particular, under article 29 of the LASEM An individual dispute with the mutual consent of the parties to the dispute may be resolved before arbitrator, in accordance with this law, if the subject of the dispute is: 1) termination of an employment contract and 2) failure to pay.

As for the collective disputes, under article 183 from the Law on Labor Relations, the collective agreement may provide for arbitration for the purpose of settling collective labor disputes. The collective agreement shall lay down the composition, procedure and other issues relevant to the arbitration process. If the employer and the employee agree on settling the labor dispute by arbitration, the arbitration award is final and binding for both parties. A lawsuit against the award made by the arbitration in the competent court is allowed.[51]

49 See article 41 of the Law on Trade Companies.

50 See article 182 of the Law on Labor Relations.

51 See article 183 of the Law on Labor Relations.

D. Conclusion

The different concepts of arbitrability reviewed illustrate a steady trend towards a more liberal approach regarding the arbitrability of disputes that involve a great degree of public interest. Consequently, the importance of arbitrability as a mechanism of state to control private adjudication of disputes has declined.[52]

According to Macedonian Law, any pecuniary claim that lies within the jurisdiction of the courts can be subject of an arbitration agreement. Examples for matters which cannot be referred to arbitration are (i) family law matters such as divorce, patrimony or adoption, disputes concerning personal or marital status; and (ii) public law disputes such as criminal cases or IP disputes. As for the employment disputes, the double test under the Law on International Commercial Arbitration and Law on Civil Procedure needs to be applied *in concreto* in every case.

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

52 See also Patrick M. Baron and Stefan Liniger, A Second Look at Arbitrability, Arbitration International, (Kluwer Law International 2003 Volume 19 Issue 1) pp. 27-54.

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Darko Spasevski,
Associate Professor , Ss. Cyril and Methodius University in Skopje
Faculty of Law 'Iustinianus Primus'

MACEDONIAN BANKRUPTCY LAW AND THE PROTECTING OF CREDITOR'S RIGHTS BY THE CREDITORS BODIES IN THE BANCRUPTCY PROCEDURE

A. Introduction

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Creating a strong and safety bankruptcy environment is very important as a precondition for protection of creditors' rights, which will eventually lead to increasing of legal centrality for the investors. Macedonian Law on Bankruptcy is enacted in 2006 and in this whole period until the moment is amended eight times[1].

The most important researches worldwide are showing that the future developing of the financial markets is conditioned with the stabile investor protection. An important component of a country's creditor rights is its insolvency framework, which together with a supporting judicial environment affects the degree to which commercial distress is resolved using formal bankruptcy proceedings.[2] Strong bankruptcy regimes also play a role in determining higher liquidation values and improved chances of ex-post firm survival.[3] A good insolvency regime is one with ex ante screening mechanisms that prevent managers and shareholders from taking imprudent loans and lenders from giving loans with a high probability of default. At the same time it should also deliver an ex-post efficient outcome, in that the highest total

1 Official gazette of the Republic of Macedonia no. 34/2006, 126/2006, 84/2007, 47/2011, 79/2013, 164/2013, 29/2014 и 98/2015

2 Stijn Claessens, Leora Klapper, "Insolvency Laws Around The World – A Statistical Analysis And Rules For Their Design" available at https://www.cesifo-group.de/DocDL/dicereport106-forum2.pdf

3 Ibid.