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## RESOLUTION OF COMMERCIAL DISPUTES THROUGH ARBITRATION AS A CONTRIBUTOR TO IMPROVEMENT OF BUSINESS ENVIRONMENT IN SERBIA<sup>1</sup>

Rešavanje privrednih sporova putem arbitraže kao  
faktor unapređenja poslovnog ambijenta Srbije

### Abstract

The paper presents a brief overview of selected arbitration-related issues (legal framework for arbitration, different types of arbitration, arbitration agreement, arbitrators, seat of arbitration, law applicable to the arbitration proceedings and merits, arbitration award, costs), in light of contemporary arbitration trends and practices and with special emphasis on Serbian legislation and existing arbitral practice in Serbia. Furthermore, it provides readers with drafting considerations when agreeing to arbitration, and comparative analyses of advantages and disadvantages of arbitration, as dispute resolution mechanism which can, in authors' view, significantly contribute to reduction of transaction costs and overall improvement of business environment in Serbia.

**Key words:** *arbitration, commercial disputes, arbitrators, arbitration agreement, applicable law, arbitral award, costs*

### Sažetak

Predmet rada predstavlja analizu najvažnijih instituta arbitražnog prava (pravni okvir, vrste arbitraže, arbitražni sporazum, arbitri, mesto arbitraže, merodavno pravo, arbitražna odluka, troškovi) u svetlu savremenih arbitražnih trendova i prakse. Posebna pažnja posvećena je srpskom pravnom okviru za arbitražu, kao i srpskoj arbitražnoj praksi. Rad sadrži i konkretne preporuke od značaja za pravilno sastavljanje arbitražnih klauzula, kao i uporednu analizu prednosti i mana arbitraže kao mehanizma za rešavanje sporova koji, prema mišljenju autora, može dovesti do značajnog smanjenja transakcionih troškova i doprineti unapređenju poslovnog ambijenta Srbije.

**Ključne reči:** *arbitraža, trgovački sporovi, arbitri, arbitražni sporazum, merodavno pravo, arbitražna odluka, troškovi*

### General introduction

Arbitration is a private system of dispute resolution based on parties' consent [16, p. 1], [14, p. 17]. The decision makers in arbitral proceedings, i.e. arbitrators – are individuals selected by the parties, independent from national governmental and judicial hierarchy. They may be, and often are, lawyers, but they may as well be experts in other areas such as engineers, architects or economists. The procedural setting for arbitration, including the place of arbitration, language of the proceedings as well as the applicable rules, is to a large extent tailored by the parties, whereas the final product of arbitration – an arbitral award – in most instances is a final and binding decision that cannot be appealed to a higher-level court.<sup>2</sup>

The use of arbitration as a mechanism for dispute resolution dates back to the Roman times [27, pp. 526-530], [3, pp. 7-64]. Yet, in the past few decades it has received increased popularity and global recognition as the 'ordinary and normal method' of resolving commercial and investment disputes, in particular those of international character [1, p. 1], [16, p. 1], [19, p. 187], [4, p. 17]. This is

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2 Unlike many arbitration laws, 1996 English Arbitration Act in limited circumstances provides for an appeal to the court on a question of law, unless the parties have agreed otherwise (Art. 69(1)).

due to its adaptability to the needs of business community and its multi-faceted advantages over litigation before national courts.<sup>3</sup> Consequently, by agreeing on arbitral dispute resolution Serbian businesses would not only enable themselves with recourse to a faster and in most cases less costly and more efficient dispute resolution mechanism, but would also significantly contribute to enhancement of overall business climate in Serbia.<sup>4</sup>

This is particularly important given that Serbia is ranked as 103<sup>rd</sup> country in the world in enforcing contracts, according to 2013 Doing Business World Bank Survey, as it takes 635 days to enforce a contract before a court at costs amounting to 31,3% of the claim and after utilizing 36 different procedures.<sup>5</sup> Thus, the aim of this paper would be to provide business decisions makers in Serbia with a necessary insight into the basic notions of arbitration, as well as its advantages and applicability in the context of their commercial transactions. This in turn would reflect on commercial entities making informed decisions when choosing the appropriate alternative adjudication mechanism that would govern their business relationship once the dispute has arisen and thus contribute to reduction of transaction costs.

The paper contains a brief overview of selected arbitration-related issues (legal framework for arbitration, different types of arbitration, arbitration agreement, arbitrators, seat of arbitration, law applicable to the arbitration proceedings and merits, arbitration award, costs), in light of contemporary arbitration trends and practices and with special emphasis on Serbian legislation and existing

arbitral practice. Furthermore, it provides readers with drafting considerations when agreeing to arbitration, and comparative analyses of advantages and disadvantages of arbitration as dispute resolution mechanism.

## Different types of arbitration

Arbitration may be classified pursuant to several criteria. Based on the organization structure of the arbitration, arbitrations may be institutional or *ad hoc*; based on existence (or lack thereof) of a foreign element and the localization of the seat arbitrations may be regarded as either domestic or international; based on the subject matter of the dispute, arbitration may be general (dealing with all kinds of disputes) or specialized (dealing specifically with e.g. maritime disputes, intellectual property disputes, sport-related disputes etc); based on the character of the parties in dispute arbitration may be open or closed (only for members to a specific trade association – e.g. wheat, cotton or corn association etc.). Having in mind the aim and scope of this paper, the authors have decided to focus solely on the first two of the mentioned classifications in the upcoming paragraphs.

When agreeing on arbitration, the contracting parties may opt for a certain institutional or *ad hoc* arbitration.<sup>6</sup> Institutional arbitrations exist within chambers of commerce or other professional associations; they are not contingent on the existence of a particular dispute; they have a permanent organization, technical apparatus (office space and secretariat), detailed set of Rules and often the suggested (or mandatory) list of arbitrators.<sup>7</sup>

3 In an international arbitration survey conducted by Queen Mary School of International Arbitration in 2006, 73% of respondents interviewed stated that they prefer to use international arbitration to resolve their cross border disputes [20]. The 2013 survey shows that certain industries, such as construction and energy, use international arbitration as a clearly preferred dispute resolution mechanism [22]. The top reasons for choosing international arbitration are flexibility of procedure, the enforceability of the awards, the privacy afforded by the process, the ability of parties to select the arbitrators and the depth of expertise of arbitrators.

4 According to *Casella*, the arbitration contributes not only to an increase of a competitiveness of a business exposed to arbitration, but also adds to expansion of international trade, which subsequently positively affects the domestic market where such business is located and unburdens the judiciary [5]. On a more local level, arbitration contributes to the local economy as it generates a variety of accompanying economic activity, from use of local counsel, experts and arbitrators, to use of local legal support and venues, local hotels and restaurants [6, p. 10].

5 According to 2013 Doing Business World Bank Survey, the trial itself lasts on average 495 days in Serbia, whereas it takes 110 days to enforce a judgment [9].

6 However, in some countries opting for an *ad hoc* arbitration is not allowed. This is, for example, a case in China. Furthermore, in the Republic of Macedonia, domestic disputes (unlike international ones) may only be arbitrated before the institutional arbitration.

7 Some of the most renowned institutional arbitrations worldwide are: International Chamber of Commerce Arbitration Court in Paris (ICC Arbitration Court), Courts of Arbitration attached to Swiss Chambers of Commerce, The London Court of International Arbitration (LCIA), American Arbitration Association (AAA), the International Centre for Dispute Resolution (ICDR), The Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Vienna International Arbitration Centre (VIAC), German Institution of Arbitration (DIS), The International Commercial Administration Court at the Russian Federation Chamber of Commerce and Industry (ICAC), China International Economic and Trade Arbitration Commission (CIETAC), The Hong Kong International Arbitration Centre (HKIAC) and Singapore International Arbitration Centre (SIAC).

On the other hand, *ad hoc* arbitrations are established to resolve a specific dispute, and they cease to exist once the arbitration award is delivered. They have no permanent organization, no office space and administration, whereas the applicable rules in these arbitration are usually subject to agreement of the parties, UNCITRAL Rules of Arbitration (dated 15 December 1976, and revised in 2010) adapted specifically to this type of arbitration [19, p. 189].

From the outlined differences between institutional arbitration and *ad hoc* arbitration stem the main advantages and disadvantages of each choice. Institutional arbitration performs important administrative functions that help both the parties and the arbitrators (selection of the arbitrators, communication between the parties and the arbitrators, fee collection etc.). Furthermore, the institutional arbitral centers provide for carefully drafted arbitration rules which guarantee both the efficiency of the arbitral process and its foreseeability. Last but not least, the credibility of the arbitral institutions makes the non-prevailing party less interested in denying the enforcement of the arbitral award or engaging in the set-aside procedure. On the other hand, parties may prefer *ad hoc* arbitration as it provides for their greater impact in making the rules of procedure compliant to the needs of their specific dispute. Furthermore, the pool of arbitrators they may choose from is in no way limited by sometimes mandatory lists of arbitrators in the institutional arbitral setting. Moreover, *ad hoc* arbitrations may be more attractive when one party to the dispute is a state entity or a state, or where a dispute regards a particularly complex issue which requires tailor-made rules of procedure. Finally, *ad hoc* arbitrations may be less costly, as there

are no administrative fees to be paid and the arbitrators' fees are subject to negotiation between the parties and arbitrators. However, the efficiency of *ad hoc* arbitration requires to a large extent the cooperation of the parties. In cases where parties attempt to obstruct the proceedings, the institutional arbitration is a much better choice as it does not require a court involvement in bringing the proceedings back to their right track.

Although there are no statistics on the number of cases brought before *ad hoc* arbitral tribunals, relevant arbitration surveys show that institutional arbitrations are preferred choices in today's world of arbitration.<sup>8</sup> The most commonly cited reasons for opting for institutional arbitration are reputation, familiarity with proceedings, an understanding of costs and fees and the convenience of using an established process [20]. As for the competition between different arbitral institutions, it can be noted from Table 1 that ICC Court of Arbitrations is still a leading institution in Europe, whereas the ICDR is a leader in North America and CIETAC on Asian soil.<sup>9</sup>

Whether an arbitration is domestic or international depends either on the nationality of the parties, or on the place of performance of party's obligations or location of the seat of arbitration. According to Article 1(3) UNCITRAL Model Law arbitration is deemed international if:

8 The 2006 Queen Mary arbitration survey shows that over 75% of corporations opt for institutional arbitration. The ICC, AAA/ICDR and LCIA are listed as the most commonly used by participating corporations [20].

9 Presented statistics are made available by Intuitions on their websites. It should be noted that the proportion of international cases varies greatly from institution to institution. For example, in 2009: 172 cases were filed before DIS, out of which in only 45 foreign parties were involved; 48 cases were filed before VIAC out of which 26 involved foreign parties; 216 cases were filed before SCC out of which 96 involved foreign parties, etc.

**Table 1: Annual caseload of leading arbitral institutions**

Institution	Type	2007	2009	2011	TOTAL
ICC	International and domestic	599	817	795	2211
LCIA	International and domestic	137	272	224	633
SCC	International and domestic	170	216	199	585
Swiss Chambers	International	59	104	87	250
DIS	International and domestic	100	172	174	446
VIAC	International and domestic	30	48	83	161
AAA/ICDR	International	621	836	994	2451
HKIAC	International	448	649	275	1372
SIAC	International	86	160	188	434
CIETAC	International	1118	1482	1435	4035

- “(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
- (b) one of the following places is situated outside the State in which the parties have their places of business:
- (i) the seat of arbitration if determined in, or pursuant to, the arbitration agreement;
  - (ii) any place where a substantial part of obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
- (c) the parties have expressly agreed that the subject-matter of the arbitration agreement related to more than one country”.<sup>10</sup>

This distinction may be significant because different rules may apply to domestic and international arbitration, and thus party’s autonomy may be less (in international arbitration) or more limited (in domestic arbitration).<sup>11</sup> Furthermore, the distinction is relevant because certain arbitral institutions reserve their competence only to issues relating to international disputes, whereas others offer their dispute resolution services irrespective of the type of dispute.<sup>12</sup> The differentiation between the two is often better observed from the perspective of practical

considerations examined by the arbitral tribunals in practice and the relevant issues reviewed in this regard.<sup>13</sup>

## Arbitral institutions in Serbia

There are only two existing arbitral institutions in Serbia at the moment: 1) The Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce – FTCA, providing services for resolution of disputes of international business character and 2) The Permanent Court of Arbitration attached to the Serbian Chamber of Commerce – PCA, providing services for resolution of domestic business disputes amongst its members, both of which have a long lasting history dating back from the second half of the XX century. While the full statistics on the PCA work were not available to the authors, the statistics of FTCA clearly confirm the importance that this institution played for the resolution of business disputes amongst the parties from former Yugoslavia and abroad. Namely, as Table 2 shows<sup>14</sup>, already in the period of 1951-1960, 580 disputes were resolved before this arbitration institution, i.e. 58 per year, which is a significant number of international

10 The same criteria for defining international arbitration have been used in Art. 3 of the Serbian Arbitration Law. This article further specifies that for the purposes of this Law the international arbitration relates to disputes arising out of international business relations. Whilst Serbian Law of Arbitration does not define what is encompassed under the term international business relations, the UNCITRAL Model Law in Art. 1, ft. 2 specifies that: “the term ‘commercial’ should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation’ carriage of goods or passengers by air, sea, rail or road”.

11 According to Serbian Law on Arbitration, in international arbitration parties are free to agree upon application of foreign procedural law (Arts. 2 and 32) and substantive law (Art. 50). Furthermore, in some countries (e.g. Macedonia) domestic arbitration proceedings must be conducted before the institutional arbitration and not before the *ad hoc* arbitral tribunal.

12 E.g. The FTCA Rules provide only for settlement by arbitration of disputes of international business character (Art. 1).

13 A recent arbitral award rendered by the arbitral tribunal acting under the Rules of the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce confirms the acceptance of the wider definition of the internationality of a dispute introduced by the new Serbian Arbitration Law by accepting jurisdiction in a case where both parties were companies established and registered in Serbia, the contract was concluded in Serbia, the contract was to be performed in Serbia, and Serbian law was chosen as the applicable law. Despite these facts, the Tribunal found that the underlying dispute arises out of an international business transaction based on the fact that the contract was drafted both in Serbian and English language, whilst it was stated that in case of a dispute the English version should prevail; the language of communication between the parties was English; the currency of the Respondent’s obligation to pay was foreign (EUR) and a foreign company (UK company with seat in London) had the controlling share in the capital of the Respondent company (100% share), whose director and agent was a foreign person. The small amount of the Respondent’s capital (1,500 EUR) and the entire property over the company by a foreign company were also held to show that the Respondent company was established only as a legal instrumentality of the foreign company for purposes of achieving the specific goal – making the investment in Serbia. As an additional indicator of the international character of the underlying transactions the Claimant pointed out that the Respondent started performing the contract (building a factory for the Claimant) upon being granted subsidies by the Serbian Investment and Export Promotion Agency. Finally, the Tribunal pointed out that the parties themselves deemed that the contract is of an international character, as they provided for jurisdiction of FTCA in their contract. (FTCA Award No. T-11/08 of 15 April 2009).

14 Presented statistics are available thanks to the courtesy of the FTCA Secretariat.

Table 2: Caseload of Serbian FTCA

Period	Number of cases filed	Average per year
1947-1950	14	3
1951-1960	580	58
1961-1970	1244 including "Fair disputes" <sup>15</sup>	124
	655 excluding Fair disputes	65
1971-1980	2617 including Fair disputes	261
	814 excluding Fair disputes	81
1981-1990	3017 including Fair disputes	301
	1232 excluding Fair disputes	123
1991-2000	585 including Fair disputes	58
	340 excluding Fair disputes	34
2001-2010	242	24

cases not only if measured by past, but present standards as well. The number steadily grew over the years until the years of dissolution of the SFRY, when the caseload of the FTCA plummeted. Not only did traditional customers of the FTCA from former Yugoslav republics cease to bring their disputes before the FTCA but, given the UN economic sanctions, there were hardly any new contracts being concluded which would call for jurisdiction of the FTCA. Prospects looked marginally better once the sanctions were lifted, and after 2001 looked set to improve. However, as the figures show, current caseload is only a fraction of what it used to be. For what it is worth, it is still amongst the highest in the region and the highest in comparison to other institutional international arbitration centers established in the former Yugoslav republics [8, p. 3].

As for the values involved in cases brought before the FTCA, the majority of cases (53%) filed from 2005 to 2011 regard claims for the amounts up to EUR 50,000, 34% deal with cases involving amounts from EUR 50,000 to EUR 1 million, whereas only 12% of the cases deal with claims over EUR 1 million. The largest amount of the claim filed before the FTCA amounts to EUR 68.347.168 (in 2010). As to the users of the FTCA services, apart from Serbian business, the parties involved in arbitration before FTCA in the period of 2005-2011 came from Macedonia (in 18% of cases), Bosnia and Herzegovina

(15%), Italy (7%), Russia (6%), Hungary and Montenegro (4% each), Germany, Switzerland, Croatia and Romania (3% each), USA, Cyprus, Bulgaria and Albania (2% each), whereas parties from Greece, Austria, Slovakia, France, UK, Spain, Ukraine, Hong Kong, British Virgin Islands, Slovenia, Lebanon, Turkey, Lithuania, Sweden, United Arab Emirates, Netherlands and Poland participated in at least one arbitration proceedings.<sup>16</sup>

The information on the number of cases filed before the PCA in the past five years<sup>17</sup> shows that institutional domestic arbitration has so far failed to raise sufficient interest amongst the Serbian business community. While the reasons for this occurrence remain unknown to the authors, it is important to underline additional obstacles to the future work of the PCA caused by the recent entry into force of the Law on Commercial Chambers. Namely, according to the Law, the jurisdiction of the PCA is limited to resolution of the disputes amongst the members of the Chamber of Commerce of Serbia. However, as the mandatory membership requirement is now abolished, one may reasonable challenge the utility of agreeing on the jurisdiction of the PCA where it will be contingent on the membership to the Chamber of Commerce of Serbia – a condition which may be difficult if not impossible to predict whether it will be fulfilled at the time when the dispute arises and the need to submit a dispute before the PCA. The authors strongly recommend to the business users of arbitration to take this fact in consideration when

15 The Belgrade Fair was founded in 1958. The work of other Fairs in former Yugoslav republics was also developing at that time. They soon became the largest user of the FTCA services by filing requests for arbitration for unpaid rent of foreign lessees of their exhibition space. The first such case was filed in 1961, whilst this practice ceased in 1993. These cases amounted to 18,8% FTCA caseload in 1963 and up to 87,32% in 1980. In the meantime, the number of cases filed by Belgrade and other Fairs from former Yugoslavia approximately amounted to half of the FTCA's caseload.

16 The information on the values of claims submitted to FTCA, and nationality of the parties to the proceedings, was obtained from the FTCA Secretariat.

17 According to information received from the PCA Secretariat, the number of cases in the past five years is marginal, i.e. amounts to less than 10 altogether.

agreeing upon arbitration before the PCA. Under these circumstances and in the absence of an alternative dispute resolution venue in Serbia, it is far better to call for an *ad hoc* arbitration than to agree on the PCA jurisdiction and risk ending up before state courts because one or both of the parties to the arbitration agreement is no longer a member of the Serbian Chamber of Commerce at the time the dispute has arisen.

## Legal framework for arbitration

The legal framework for arbitration is built up by both international and domestic sources. The most important international sources of arbitration law are the ratified international conventions related to arbitration, such as: Protocol on Arbitration Clauses of 1923 (Geneva Protocol), Convention on Execution of Foreign Arbitral Awards of 1927 (Geneva Convention), Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention), European Convention on International Commercial Arbitration of 1961 (European Convention), Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965 (Washington Convention), all of which the Republic of Serbia is a party to. On domestic level, arbitration is regulated either in laws dealing with civil procedure, or in laws dealing with international private law, whilst some countries have enacted a separate act on arbitration (domestic and/or international) [11, pp. 71-213].

The relevant provisions of arbitration-related regulation in Serbia have until 2006 been codified in the Law on Civil Procedure and the Law on International Private Law, whereas now they are contained in the separate Law on Arbitration (hereinafter referred to as LA), based on 1985 UNCITRAL Model Law on International Commercial Arbitration (hereinafter referred to as UNCITRAL Model Law),<sup>18</sup> regulating both domestic and international arbitration, whether commercial or not (Art. 1 LA).

It is important to underline that all of these sources

<sup>18</sup> The UNCITRAL Model Law has now received global recognition as more than 60 countries have tailored their respective national legislation in accordance with the provisions of the Model Law. A complete list of national jurisdictions that adopted the UNCITRAL Model Law is available at UNCITRAL web-site: [www.uncitral.org](http://www.uncitral.org).

recognize the party autonomy as a primary source of arbitration law and, at the same time, give high regard to usages and business practices as elements of business oriented regulatory framework for arbitration.

## Arbitration agreement

### Notion

The main prerequisite for arbitration proceedings to take place is to have a valid agreement of the parties to submit their current or future dispute in respect of a defined legal relationship to arbitration (Art. 9 LA). The arbitration agreement is thus a mandatory requirement for the establishment of jurisdiction of arbitration and a constituent basis for derogation of the state court jurisdiction (Art. 4 LA).

Arbitration agreement appears in two forms, depending on whether the arbitration is envisaged for all future disputes that may arise from the defined legal relationship between the parties or for the already existing dispute. The former is usually referred to as an arbitration clause (*clause compromissoire*), and the latter as an arbitration compromise (submission agreement, *compromis d'arbitrage*) [17]. In international business practice, the arbitration compromise has been less frequently used, which is not surprising given that once the dispute has arisen it is less likely for the parties to reach an agreement on any aspect of the dispute, including the dispute resolution mechanism. The differentiation between the arbitration clause and the arbitration compromise does not bear a significant practical relevance, given that the contemporary sources of arbitration law treat both forms of arbitration agreement equally.

### Essential elements

Parties' freedom to agree on the terms of the arbitration agreement is subject to the general rules on validity of the arbitration agreement (capacity to conclude contracts, meeting of minds, subject-matter, basis, and form of the agreement) [17, pp. 87-151]. The essential elements of an arbitration agreement are the constitution of the arbitral jurisdiction and delimitation of dispute(s) falling under the competence of arbitration.

Parties to the agreement have to be explicit about their amicable intention to submit the resolution of their dispute to arbitration. The intention to constitute the arbitral jurisdiction has to be clearly formulated, so that there is no room for doubt with respect to the intention of the parties to entrust the arbitration with the power to resolve their dispute and to their decision to recognize the resulting arbitration award as final and binding.

If the parties opt for an institutional arbitration, it suffices to agree on certain rules of that arbitration for the constitution of arbitral jurisdiction.<sup>19</sup> Unlike the institutional setting, *ad hoc* arbitration does not have its rules or permanent organization, offices, administration, and the list of arbitrators. Thus, it is necessary that the parties, which opt for the *ad hoc* arbitration define in the arbitration agreement all the matters relevant for the constitution of jurisdiction and the conduct of the proceedings. If they fail to do so, and the seat of *ad hoc* arbitration is in Serbia, provisions of the Law on Arbitration would apply by default, filling in the gaps within the agreement of the parties.

Arbitrators may rule only on the issues that are within the scope of arbitration agreement. Ruling beyond the limits set in the arbitration agreement constitutes the excess of the authority by arbitrators and represents the basis for setting aside the arbitration award and refusal of its recognition and enforcement.<sup>20</sup> Thus, it is important both that the parties to the arbitration agreement carefully define the scope of the disputes that they wish to resolve by arbitration and that the arbitrators pay due regard whether issues submitted to them for resolution fit in their mandate as defined by the arbitration agreement.

In addition to these essential elements, the arbitration agreement usually has other elements, which, although not required, significantly contribute to the completeness and precision of the arbitration clause. They may relate to the seat of arbitration, number of arbitrators, applicable

law, language of the proceedings, qualities and the qualifications of arbitrators, appointing authority, and other [19, p. 191 *et seq.*]. However, it needs to be pointed out that the short and simple arbitration clause is often much better suited for arbitration, than an elaborate or complex clause [15, p. 166].

Various institutional arbitrations offer their model arbitration clauses on their respective web-sites as recommendation to the parties when drafting the contract and conferring jurisdiction to these institutions, as their wording guarantees the existence of a valid and enforceable arbitration agreement thus safeguarding the parties from long and unnecessary interpretations of the clause by the arbitral tribunal.<sup>21</sup> Although in some cases, tailored clauses may suit business needs better than suggested model clauses, it is of utmost importance to include experienced arbitration practitioners in the drafting process in order to avoid many potential pitfalls in this regard.<sup>22</sup> This should come as no surprise, as experienced lawyers would usually negotiate and stipulate a better contract – the same standards apply to formulation of the arbitration clause as a part of it. It is thus recommended for parties to always consult a seasoned arbitration practitioner in formulating the arbitration clause, as this may have significant impact on events taking place after the contract comes under fire and the dispute between the parties arises.

## Form of the arbitration agreement

Unlike the main contracts in a business transaction,

19 Every institutional arbitration has its arbitration rules and it is considered that the parties by agreeing on institutional arbitration at the same time accept the rules of that arbitration to be applicable to the arbitration proceedings, and vice versa. These rules apply to the organization and jurisdiction of arbitration, constitution of the arbitration tribunal, arbitration proceedings, arbitration award, costs of arbitration, and other.

20 See Art. V(1)(c) of the New York Convention and Art. 34(2)(iii) of the UNCITRAL Model-law.

21 e.g. the ICC Model arbitration clause states: "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules." The FTCA clause provides: "The parties agree that any dispute arising out of or in connection with the present contract shall be finally settled by the Foreign Trade Court of Arbitration attached to the Chamber of Commerce and Industry of Serbia by application of its Rules". The UNCITRAL model clause states: "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force." Additional elements recommended for consideration suggested by UNCITRAL include: (a) The appointing authority; (b) The number of arbitrators; (c) The place of arbitration; (d) The language(s) to be used in the arbitral proceedings and (e) The law governing the proceedings.

22 For example, the parties should avoid providing only for an option to choose arbitration; the precise dispute resolution mechanism should be clearly specified; incorrect references to the arbitral institution should be avoided etc.

arbitration agreements must be concluded in writing. Written form of the arbitration agreement is required by the international conventions, national laws, and the rules of the institutional arbitrations. Pursuant to traditional solution, accepted in majority of the sources of arbitration law, the requirement of a written form is met if the agreement is contained in one document (principal agreement in terms of arbitration clause, and special document in terms of arbitration compromise), or if it is evidenced by the means of communications which ensure the proof of existence of the arbitration agreement, including the exchange of statement of claim and defense in which one of the parties invoked the existence of the agreement and the other did not contest the jurisdiction of the arbitral tribunal.<sup>23</sup> Incorporation of arbitration agreement by reference may also constitute a valid arbitration agreement.<sup>24</sup> Furthermore, modern technologies have necessarily widened the “writing requirement” of the arbitration agreement to include exchange of emails, telefax or other modern methods of communication. These solutions are also incorporated in Serbian Law on Arbitration (Art. 12) and FTCA Rules (Art. 13).

Nevertheless, the tendency towards alleviating the rigidity of requirement for the written form of the arbitration agreement is characteristic for the contemporary arbitration law. Such tendency is the result of the needs of business relations, which, under the conditions of developed information technology and electronic communications,

impose the speed and efficiency in the execution of business relations, and yet open the space for introduction of new, simplified forms of conclusion of arbitration agreements, particularly through the means of electronic communication. Solutions contained in the UNCITRAL Model-law, following the amendments of 2006, are the result of such tendency. The new solution of the Model-law in option I maintains the requirement for a written form of the arbitration agreement,<sup>25</sup> but this requirement has been drastically alleviated by the definition that a written form exists in any event when the content of the arbitration agreement is recorded in any form, whether or not the arbitration agreement or contract was concluded orally, by conduct, or by other means.<sup>26</sup> Moreover, the new solution in the Model-law provides for a series of different forms of conclusion of the arbitration agreement by means of electronic communication.<sup>27</sup> Finally, the amended Model law goes even that far to provide in Option 2 of Art. 7 a complete disregard of written form requirement. Serbian Law did not incorporate these recent trends as to the form of arbitration agreement, as the Law on Arbitration was enacted one month prior to publication of the amendments to the UNCITRAL Model law in 2006. Nevertheless, one can safely conclude that even if timing was different it is highly unlikely that Serbia would opt for the complete abolishment of written form requirement, as the Option II of Art. 7 of UNCITRAL Model law provides for. This is because the written form of the arbitration agreement still serves many important functions such as alerting the parties to the significance of this agreement by which they are giving up their right to seek legal protection before the state court, providing adequate proof of an arbitration agreement which is a prerequisite for the commencement of arbitration dispute resolution mechanism. Furthermore, it should be noted that the comments made by other governments (e.g. Italy, Belgium, France, Austria etc.) when the text of the 2006 Model Law was drafted clearly suggest that this option does not enjoy full and unanimous support on global scale [7, p. 56].

<sup>23</sup> See Art. II(2) of the New York Convention, Art. I(2) of the European Convention, Art. 178(1) of the Swiss Federal Code on Private International Law, etc. While, to the best of our knowledge, there are no cases in the recent FTCA history where jurisdiction of the FTCA was constituted on the basis of the parties' agreement made at the hearing, there are several cases where the jurisdiction of the tribunal was based on the fact that the respondent entered into discussion on the subject-matter of the dispute and did not contest FTCA's jurisdiction (e.g. the awards Nos. T-2/94 of 29 July 1996 and T-23/97 of 15 April 1999).

<sup>24</sup> Article 7(6), Option I of the UNCITRAL Model-law states: “The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.” Conclusion of arbitration agreement by reference was very common in the old Yugoslavia since contracts concluded between Yugoslav and foreign companies regularly referred to the general terms of delivery of goods agreed upon by Commercial Chamber of Yugoslavia and commercial chambers of Yugoslav trading partners – Poland, DR Germany and SSSR, which all contained an arbitration clause calling for jurisdiction of the arbitration court at the chamber of commerce of the respondent's country. The jurisdiction of the FTCA was never contested when constituted on this basis.

<sup>25</sup> Art. 7(2) of the UNCITRAL Model-law.

<sup>26</sup> Art. 7(3) of the UNCITRAL Model-law.

<sup>27</sup> Art. 7(4) of the UNCITRAL Model-law.



### Arbitrability

In order for the arbitration agreement to be valid, its subject-matter has to be capable of settlement by arbitration (objective arbitrability) and it has to be concluded between the parties which have the capacity to agree on the jurisdiction of an arbitration (subjective arbitrability). This means that certain types of disputes are not permitted to be decided by the chosen arbitral tribunal, notwithstanding the agreement of the parties in that regard.

In general terms, the scope of objective arbitrability is defined by a rule allowing parties to agree on arbitration only for matters which are not governed by mandatory rules (the rules that the parties cannot derogate from). A broad interpretation of the objective arbitrability is particularly well elaborated in the Swiss Federal Code on Private International Law, which provides that all pecuniary claims may be submitted to arbitration (Art. 177). Other legal systems usually define arbitrability by stipulating that the disputes related to the rights that the parties may freely dispose of may be submitted to arbitration. Another seldom used method is the definition of the scope of objective arbitrability through the general clause, which is then accompanied by a list of types of claims which may not be submitted to arbitration. Finally, the scope of objective arbitrability may be defined through a *numerus clausus* provision listing the types of claims which may be submitted to arbitration. In the case-law of the international commercial arbitrations, the issue of objective arbitrability was particularly discussed in the context of competition, intellectual property, UN embargos, or bankruptcy [11, pp. 345-373], [1, p. 125 *et seq.*]. Under the provisions of Serbian law, the parties may agree to an arbitration for resolution of their pecuniary disputes concerning rights they can freely dispose of, except for the disputes that are reserved to the exclusive jurisdiction of the courts (Art. 5 LA), e.g. disputes over property rights in real estate located in Serbia and disputes over lease of such real estate.<sup>28</sup>

In the widest sense, the subjective arbitrability means that the arbitration agreement, in order to be valid, has to be concluded between the parties which have the capacity to agree on the jurisdiction of an arbitration. The matter

<sup>28</sup> Art. 56 of Serbian Act on Private International Law.

of subjective arbitrability is primarily discussed within the context of conclusion of the arbitration agreement by the States and other legal persons of public law. As for the question whether a State may conclude arbitration agreements, the prevailing position in the contemporary arbitration legal doctrine and practice is that a State, government, or other person of public law may agree on arbitration in full scale if the arbitration agreement pertains to the private legal relation. This is also specifically provided in Art. 5 of the Serbian LA.

### Autonomy of the arbitration agreement

The principle of autonomy of the arbitration agreement has been widely accepted in legal doctrine and arbitral practice [23, p. 249 *et seq.*], [2], [13, p. 499], [25, pp. 582-583], [14, pp. 52-54], [18, pp. 535-544]. The most important legal consequence of this principle is reflected in the independence of the arbitration clause in relation to the principle agreement. It means that the existence, validity, and legal force of the clause do not depend on the legal destiny of the agreement in which it is contained. The other important consequence of the principle of autonomy of the arbitration agreement is reflected in a possibility that the arbitration agreement can be subject to the law different from the law applicable to the principle agreement [17, pp. 77-86]. Finally, the principle of autonomy of the arbitration agreement is related to the principle “*compétence-compétence*”, which authorizes the arbitration to rule on its own jurisdiction.<sup>29</sup>

The principle of autonomy of the arbitration agreement is explicitly envisaged by the UNCITRAL Model-law<sup>30</sup> and, as a consequence, is contained in the vast majority of modern national laws in the area of arbitration, including Serbian Law on Arbitration (Art. 28). On the other hand, in the countries where the laws do not contain an explicit legal provision of this principle, the principle of autonomy of the arbitration agreement is applied by the jurisprudence [19, p. 219 *et seq.*]. A fairly large number

<sup>29</sup> See Art. 28 of the LA; Arts. 14 and 18 of the FTCA Rules.

<sup>30</sup> Article 16(1) of the UNCITRAL Model-law stipulates that “the arbitration clause which forms part of a shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.”

of the arbitration rules also adopt the principle of the autonomy of the arbitration agreement. The UNCITRAL Arbitration rules explicitly provide for this principle,<sup>31</sup> as well as the Rules of the ICC Arbitration Court,<sup>32</sup> rules of the FTCA<sup>33</sup> and many more.

## Arbitrators

### Appointment of arbitrators

It is often emphasized that one of the advantages of arbitration over state court is the freedom given to the parties in selecting a person(s) who will resolve their dispute [20, p. 6]. According to comparative arbitration laws and rules, parties are given a wide discretion with respect to the appointment of arbitrators both in terms of the qualifications of arbitrators needed and in terms of the procedure for the appointment of arbitrator(s). In the absence of parties' agreement, national laws or arbitration rules offer various flexible solutions in this regard.<sup>34</sup> In practice, in case of three-arbitrator panels, usually one party appoints one arbitrator, the other appoints the second, and the two appointed arbitrators agree on the third – presiding arbitrator.

### Nationality and qualifications of arbitrators

According to the Serbian Law on Arbitration and the pertinent FTCA Rules, any natural person having contractual capacity, irrespective of his/her nationality, may act as an arbitrator in Serbia, provided that he/she possess the qualities agreed upon by the parties.<sup>35</sup>

31 Art. 21(2) of the UNCITRAL Arbitration Rules.

32 Art. 6(4) of the ICC Rules.

33 Art. 14 of the FTCA Rules.

34 See Arts. 16-26 of the LA, Arts. 20-28 of the FTCA Rules.

35 The only exception to this rule regards a person sentenced to an unsuspended sentence of imprisonment while the consequences of the conviction are in effect (Art. 19 of the LA). Furthermore, the FTCA Rules require that a sole arbitrator, or a presiding arbitrator in three-arbitrator panels must be selected from the List of Arbitrators maintained by the FTCA. The List currently contains the names of 27 persons from Serbia and 16 persons from abroad, coming from neighboring countries, UK, Austria, Germany, Switzerland, France, Russia and elsewhere. The professional profile of these arbitrators is limited to persons with legal education coming from universities, private practice and corporate environment. However, legal education of an arbitrator is not a prescribed requirement under the FTCA Rules. Previous Lists of the FTCA, including the very first one, contained names of people with different professional backgrounds, including engineers and economists.

In some cases, the contracting parties define the desired qualifications of arbitrators in the arbitration agreement. Thus, it is sometimes envisaged that arbitrators (or only the presiding arbitrator) have to be “professional lawyers” or “highly qualified lawyers in the field of international commerce”, or to have “long-lasting experience in the trade”, or perhaps that the presiding arbitrator “cannot be from the State where one of the parties has its seat”, that is, the arbitrator has to come from a “third country”. On the other hand, in complex disputes related to some specific areas, the contracting parties, in the arbitration clause, may list a series of qualities, which arbitrators have to have [19, p. 196].

### Number of arbitrators

As a rule, the contracting parties may agree on the number of arbitrators. However, in many national laws, including Serbia<sup>36</sup>, the odd number of arbitrators is a mandatory requirement. This is understandable given that the award has to be made by a majority decision of the arbitrators. If the parties fail to agree on the number of arbitrators, their number will be determined pursuant to the rules of institutional arbitration, by the relevant appointing authority or the court. For example, according to the ICC Rules if the parties fail to agree on the number of arbitrators, the Arbitration court will appoint a single arbitrator, except if it finds that the dispute is of such nature that it requires the appointment of three arbitrators (Art. 8). On the other hand, the FTCA Rules determine the number of the arbitrators depending on the value of the dispute. Unless otherwise agreed by the parties, any dispute over USD 70,000 shall be decided by a panel of three arbitrators, and any dispute of a smaller value by a sole arbitrator (Art. 20).<sup>37</sup> Although three-arbitrator panels have become a norm in the arbitration practice, a decision on the number of arbitrators (one, three

36 Art. 16(2) of the LA.

37 The FTCA archives reveal that the value involved in cases decided by the FTCA varies from several thousands of euros to several millions of euros. Approximately one half of these cases was decided by sole arbitrators, who were, in most cases, appointed by the Chairman of the FTCA since the parties failed to agree on an arbitrator. The same trend has been noted in appointing the Chairman of the arbitral tribunal, since party appointed arbitrators rarely agree on the Chairman of the tribunal.

or more) should not be taken lightly, as it may significantly affect the costs of the proceedings.<sup>38</sup>

### Independence and impartiality of arbitrators

The principle of independence and impartiality of arbitrators, one of the fundamental principles related to the personality of the arbitrator, has been widely accepted in the comparative law. This principle is explicitly set out in the UNCITRAL Model-law, as well as in the majority of national laws on arbitration and rules of the institutional arbitrations [17, p. 171 *et seq.*], including Serbia.<sup>39</sup>

In line with the requirement of arbitrator's independence and impartiality, there are some restrictions on arbitrators regarding persons closely connected to the parties in dispute. Hence, employees of the parties, members of their governing bodies and their permanent associates may not be appointed as arbitrators in disputes in which those parties are involved. Also, arbitrators may not act as party's counsels or legal advisors (Art. 24 FTCA Rules). More detailed and topic-specific rules on prevention of conflicts of interest in international commercial arbitration are provided by the International Bar Association [12], and are often considered by arbitrators in international arbitration proceedings.

### Challenge procedure

Grounds for disqualification of arbitrator by the rule pertain to his/her independence and impartiality, as well as the lack of qualities or qualifications agreed upon by the parties. Thus, under the UNCITRAL Model-law, an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made (Article

12(2)). The same rules are contained in the Serbian Law on Arbitration (Arts. 23 and 24).

Unless the parties have agreed otherwise, the decision on the challenge is to be made by the competent court (Art. 24(3) LA). If the FTCA is in charge of the dispute, the FTCA Board decides on the challenge after giving the arbitrator concerned the opportunity to comment upon the challenge. The decision on challenge does not have to include a statement of reasons (Art. 27(3) FTCA Rules).

Unlike the UNCITRAL Model Law on International Commercial Arbitration neither Serbian Law on Arbitration nor the FTCA Rules contain a provision entitling a party to request the court to decide on the challenge of arbitrator, where the arbitral tribunal has rejected such request. Hence the decision on the challenge is final.

### Seat of arbitration

Seat of arbitration has a multifold relevance in disputes before the international commercial arbitration. First of all, the law of the seat of arbitration (*lex arbitri*) often sets the criteria for validity of the arbitration agreement. Furthermore, the application of the procedural law of the country of the seat of arbitration to the arbitration proceedings is, as a rule, subsidiary. This law applies in the absence of the procedural law chosen by the parties (in terms of the institutional arbitration, this rule applies to the matters not defined in the rules of arbitration, unless the parties envisaged a different procedural law). In addition, the seat of arbitration is relevant, on the one hand, as the courts in the country of the seat of arbitration may be required to play an important role in the proceedings as to the constitution of the tribunal, final decision on the validity of arbitration agreement etc., whilst, on the other, it is the law of the seat that provides for important limitations on the court intervention in arbitration proceedings. Moreover, the seat of arbitration is important in determining the "nationality" of the arbitration award, as well as the procedure for recognition and enforcement. Last but not least, the seat of arbitration is of a special relevance for the control of the arbitration award, considering that the court of the seat of arbitration is competent for ruling on the request for setting aside of the award. In the absence of

38 E.g. The costs of proceedings in a case submitted to ICC arbitration with a one million dollar claim, the arbitrator's fees will, on average, amount to 39.000 dollars, whereas the arbitrators' fees in the three-arbitrator panel will amount to 117.000 dollars. See <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/cost-and-payment/cost-calculator/>.

39 Art. 19(3) of the LA.

parties' agreement, the seat of arbitration will be defined by institutional arbitration<sup>40</sup> and/or arbitration panel or sole arbitrator in *ad hoc* arbitration.

The vast majority of the sources of arbitration law give the freedom to the parties to agree on the seat of arbitration. However, in absence of such choice, there are subsidiary rules which help determining the seat of arbitration. Serbian LA provides that in case that the parties did not agree on the seat of arbitration, the arbitral panel would determine the seat of arbitration giving due regard to the circumstances of the case and suitability of the seat of arbitration for the parties. If the parties opted for institutional arbitration, seat of arbitration will be determined pursuant to its rules. Finally, if the seat of arbitration cannot be determined in any of the previously stated ways, the seat of arbitration will correspond to the place where the award was made (Art. 34 LA).

The above-mentioned relevance of the seat of arbitration is definitely an important element to be considered when drafting the arbitration agreement. The quality of legislative setting in which the arbitrators are conducting the proceedings and making the award (in the country of the seat of arbitration) is to be treated with equal importance as the quality of arbitrators who are given the mandate to resolve the dispute. Many of the advantages of arbitration can be easily jeopardized if the seat of arbitration is not carefully selected. Thus, it is not surprising that many businesses nowadays choose arbitration with seat in Switzerland (even where rules of non-Swiss institutions apply),<sup>41</sup> as the Swiss arbitration law is regarded as one of the laws of the highest quality and so is the service of the Swiss judiciary in assisting the arbitration. Furthermore, the general attitude towards arbitration in Switzerland is portrayed as an arbitration-friendly environment, and the jurisdiction of the courts deciding on setting aside of the award is vested with the supreme judicial authority – the Swiss Federal Supreme Court.

<sup>40</sup> See Art. 14 of the ICC Rules.

<sup>41</sup> According to 2010 Queen Mary arbitration survey, the four most popular arbitration venues are London, Paris, New York and Geneva. On the other hand, respondents have the most negative perception of Moscow and mainland China as seats of arbitration [26].

## Confidentiality and language of the proceedings

Confidentiality is commonly considered as an essential feature of arbitration<sup>42</sup> and an important reason why business entities opt for arbitration as a dispute resolution mechanism [20, p. 6]. Unlike the court proceedings, arbitration proceedings are held behind the closed doors, unless the parties agree otherwise (which in essence rarely happens in commercial arbitration). This enables the parties to keep their business practices, trade secrets, intellectual property as well as proceedings that could negatively impact on their reputation, completely private.

The FTCA, just like many other arbitral institutions, ensures the confidentiality of the proceedings (Art. 37(3) FTCA Rules). The confidentiality of the proceedings usually extends to confidentiality of the award. Consequently, as a rule, the full text of the FTCA award may be published only with consent of the parties. However, the Chairman of the FTCA may authorize the publication of the award in periodicals of professional and doctrinal character without disclosing the names of the parties or information that may be damaging to the interests of the parties (Article 51(3) FTCA Rules).<sup>43</sup>

As for the language of the proceedings, the modern arbitration laws provide that the parties may agree on the language or languages to be used in the arbitral proceedings either in their contract or subsequently (Art. 35 LA). This is an important consideration when starting the arbitration procedure, as it impacts the language in which the statement of claim needs to be submitted, the selection of arbitrators, and the hiring of legal representatives in arbitration. In the

<sup>42</sup> The importance of preserving confidentiality of the proceedings as a landmark principle of arbitration law was highlighted in the award No. T-26/97 of 11 October 1998, where the Respondent's request to notify the third party of the ongoing proceedings was rejected by the Tribunal. The Tribunal stated: "The confidentiality of the arbitral proceedings is one of the most important reasons why business people opt for resolution of their disputes before arbitration courts. [...] Third parties cannot be given an opportunity to attend the arbitral proceedings especially if one of the parties objects, as is the case here."

<sup>43</sup> Consequently, some abstracts of the FTCA award have been published in the FTCA's own journal on arbitration practice – Arbitraža and similar periodicals. Also, recently, some of the FTCA awards have been published both in Serbian and English at the Pace University web-site (after being anonymized first) as a result of participation of the University of Belgrade Faculty of Law at the Queen Mary translation project in order to enable easier access to the global caseload on application of the UN Convention on Contracts for International Sale of Goods.

absence of parties' agreement, the arbitral tribunal will decide upon this issue, taking into account the place of arbitration and the language used by the parties in their legal relationship. Permanent arbitral institutions may regulate the issue of language of the arbitral proceedings by their rules, e.g. absent the agreement of the parties, the FTCA arbitration proceedings are conducted in Serbian language.<sup>44</sup>

### Law applicable to the arbitration proceedings

The comparative arbitration law has widely accepted the principle according to which the parties may freely agree on the rules applicable to the arbitration proceedings. Such freedom is uncommon before the state courts and is rightfully listed as one of the major advantages of arbitration in comparison to court adjudication.

Where the parties have conferred jurisdiction to an arbitral institution, the rules of such institution apply to the disputes brought before them. On the other hand, in the arbitration clauses which call for *ad hoc* arbitration, the UNCITRAL Arbitration rules (as model rules) are often agreed upon. In the absence of the parties' agreement as to a specific issue of arbitral procedure, the law of the seat of arbitration governs the issue.

Serbian Law on Arbitration, following the provision of UNCITRAL Model law, gives the freedom to parties to agree on the applicable procedural law. Pursuant to the Law, the parties may freely agree on the procedural rules which will be applied by the arbitration court or refer to certain rules, and if the arbitration is international, the parties may agree on the application of a foreign procedural law. In the absence of the agreement by the parties, the arbitration court conducts the proceedings in a way which it deems appropriate. The only limitation refers to the requirement that the arbitration proceedings have to be in line with the fundamental principles of the Law,<sup>45</sup> such as the principles of party equality and the principle of the right to be heard (each party with an opportunity to present his case and evidence, as well as

to state his position with respect to acts and proposals of the opposing party).<sup>46</sup>

### Law applicable to the merits

Just as the parties are given the freedom to choose the rules of procedure in arbitration proceedings, they are given the freedom to choose the applicable law or rules of law to the merits of their case. This is another landmark of arbitration proceedings, also recognized in Serbian law (Art. 50(1) LA). The most important factor in choosing the applicable law in international business practice is the perceived neutrality and impartiality of the legal systems, the appropriateness of the law for the type of contract and familiarity with and experience of the particular law [26, p. 11]. On the other hand, the business transactions and their logics are often tailored to fit specific needs of a market and thus applicable law. Arbitration provides a forum where the choices made by the parties are fully upheld and enforced, ensuring that the initial business reasoning behind the parties' preference is brought to life within the dispute.

In the absence of parties agreement, the arbitral tribunal in international arbitration shall determine the law or rules on the basis of conflict of laws rules it find appropriate (Art. 50(3) LA, Art. 48(2) FTCA Rules). In any event, they are required to pay due regard to the terms of the contract and trade usages that may be applicable to the transaction. Unlike before state courts, the award may be made exclusively on the basis of equity, if the parties have expressly given such power to the arbitrators (Art. 49(2) LA; Art. 48(4) FTCA Rules).<sup>47</sup>

### Arbitration award

The arbitration tribunal rules on the merits of the dispute within the final arbitration award. According to the FTCA

44 According to FTCA statistics, in the period from 2006 to 2011 English was used as the language of the proceedings in 5 cases.

45 See Art. 32 of the LA.

46 Art. 33 of the LA.

47 According to 2010 Queen Mary arbitration survey, 81% of corporations have never used determination *ex aequo et bono* or as *amiable compositeur*, while 16% of them stated that they use them often [26]. In the recent past, there is only one FTCA award where the arbitrators were given the authority to decide the case on the basis of equity (the FTCA award No. T-25/98-27 of 1 March 2001). This authorization did not stem from the arbitration agreement itself but from the subsequent parties' agreement made at the last hearing.

Rules, arbitral proceedings shall be completed within a year from the date of constitution of the tribunal or appointment of the sole arbitrator (Art. 44). The final award needs to be made within the period of 60 days from the date of the last hearing or the date on which the last in camera meeting of the tribunal was held (Art. 49(4) FTCA Rules).<sup>48</sup> From a purely business perspective, the time limits imposed by the FTCA Rules aim not only at minimizing the transaction and dispute costs, but provides commercially oriented parties with a quick resolution of the dispute and thus a foreseeable perspective on potential gains and losses in that regard. Compared to domestic judicial proceedings, where litigation disputes usually stretch for over two years before the court of first instance, and potentially year and a half before the second instance court, arbitration comes not as an inevitably faster mechanism, but also as more cost-effective.

In addition to the final award, the arbitration tribunal may deliver a partial or interim award. Partial award resolves finally one of several claims or a part of the claim. On the other hand, an interim award rules on the basis, but not on the value of the claim. If the parties manage to reach settlement in the course of the proceedings, the arbitration court will make an award based on the settlement upon the request of the parties, unless the effects of settlement are in contravention with the public policy. If the award is to be made by a panel, it must come as a result of majority vote, unless the parties agreed otherwise. The arbitration award is delivered in writing, signed by the arbitrator(s) who made it, and it contains the introduction, date and place of delivering, operative part containing the decision on the subject-matter of the dispute, a decision on costs of the proceedings, and statement of reasons, unless the parties provided in their agreement that the award would not contain the statement of reasons. The arbitration court may deliver, upon a request of a party, an additional award on the requests presented during the arbitration proceedings, which were not ruled upon in the arbitration award.<sup>49</sup>

48 In the recent years, the FTCA has shown an excellent record of efficiency in dispute resolution. The average time for rendering of an award has been reduced to less than one year from the time of constitution of the tribunal, whereas in most cases this time period was not longer than 6 months. According to 2006 Queen Mary arbitration survey, in the majority of the cases brought before the ICC and ICDR, an award is rendered within 18 months from filing a request for arbitration [20].

49 See Arts. 48-56 of the LA.

The arbitration award, regardless of whether it was made by institutional or ad hoc arbitration, has the force of a final court decision. As a rule, there is only one recourse against the final domestic arbitration award, and that is the application for setting aside an award.<sup>50</sup> Such application needs to be filed within three months from the day on which the party making the application had received the award. The decision on the request for setting aside is made by the competent court in the seat of arbitration. This court may set aside only the domestic arbitration award. Reasons for setting aside the arbitration award are limited to the control of correctness of the arbitration proceedings, and they do not refer to the merits of dispute.<sup>51</sup> According to information obtained from the FTCA Secretariat, such recourse is rarely taken against FTCA awards<sup>52</sup> and, more importantly, exceptionally

50 According to 2006 Queen Mary arbitration survey, 91% of corporations rejected the idea of including an appeal mechanism in international arbitration [20].

51 These reasons, according to Serbian law and as transplanted from the UNCITRAL Model law include the following: 1) the arbitration agreement is not valid under the law determined by the parties' agreement or under the law of Serbia, unless the parties agreed otherwise; 2) the party against whom the arbitral award was made was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; 3) the award deals with a dispute not falling within the terms of the arbitration agreement or contains decisions on matters beyond the scope of that agreement. If it is found that the part of the award going beyond the scope of the arbitration agreement may be separated from the remaining part of the award, only that part of the award may be set aside; 4) the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the arbitration agreement or with the rules of the permanent arbitral institution which was entrusted with administration of the arbitration, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, the composition of arbitral tribunal or arbitral proceedings was not in accordance with the provisions of this Act. In addition, unlike the Model Law, Serbian law lists the following reason for setting aside of the arbitral award – if the award was based on a false statement of a witness or expert or on a forged document or the award results from a criminal act of an arbitrator or a party, if these grounds are proven by a final judgment. The court shall set aside the award also, if it finds that: 1) the subject matter of the dispute is not capable of settlement by arbitration under the law of Serbia, or 2) the effects of the award are contrary to the public policy of Serbia (Art. 58 LA). The latter two reasons for setting aside of the award are evaluated by the court *ex officio*, whereas the former are evaluated only upon the request of the party.

52 The courts in Serbia before which the set aside procedure of the FTCA award is initiated are not obliged to inform *ex officio* the FTCA Secretariat of such proceedings. The information available at the FTCA Secretariat is thus only sporadic and non-systematic. According to information available in the period from 1992 to 2006, only 25 proceedings for setting aside the FTCA award have been initiated, out of several hundreds of awards that were made in the same period (the FTCA tribunals have, in average, made 20-30 awards per year in the mentioned period).

granted.<sup>53</sup> On the other hand, a foreign arbitral award, unless voluntarily performed, which is most often the case,<sup>54</sup> is subject to recognition and enforcement mechanism which is set by the globally accepted rules found in the 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which has now been ratified by 149 states, including both Serbia and all of the world's major trading nations.<sup>55</sup> This Convention binds the ratifying states to recognize not only valid arbitration agreements and decline court jurisdiction when faced with one, but also to recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon (Art. III NYC). The recognition and enforcement of the arbitral award may be refused only for limited set of reasons, mirroring the reasons listed for setting aside the

53 According to findings of Prof. Stanivuković, who has conducted a research of seven Serbian judgments made upon application for setting aside of an FTCA award, in only one case has such an application been accepted and the award set aside [24, pp. 167-201].

54 According to 2008 Queen Mary arbitration survey, 84% of the participating corporate counsel indicated that in more than 76% of their arbitration proceedings, the non-prevailing party voluntarily complied with the arbitral award [21].

55 Full list of countries that have ratified the New York Convention is available at: [www.uncitral.org](http://www.uncitral.org).

award.<sup>56</sup> According to relevant arbitration surveys, most corporations revealed no major difficulties in achieving recognition and enforcement of their arbitral awards. As a matter of fact, most corporations were able to enforce arbitral awards within one year and usually managed to recover more than 75% of the value of the award [21, p. 3].

## Cost of arbitration

It has often been pointed in the past that arbitration is less costly than adjudication in court. This, on its face, is no longer true, at least when it comes to international arbitration, as costs of arbitration services have significantly increased in the recent past.<sup>57</sup> However, the cost-effectiveness of arbitration is still not negligible, as arbitration provides for a 'one-stop shopping', i.e. it eliminates the need for a two or three tier dispute resolution mechanism (appeal excluded) [1, p. 35]. Additional cost concerns come from the different 'prices' of arbitration services of different

56 See Art. V of the New York Convention; Art. 66 of the LA.

57 The findings of the 2006 Queen Mary arbitration survey show that international arbitration is at least as expensive as transnational litigation for medium and smaller size cases. In larger, more complex cases, international arbitration may represent better value for money [20].

**Table 3: Overview of arbitration fees of selected arbitral institutions in relation to the value of the claim**

Amount in Dispute in USD	Arbitral institution	One arbitrator - average - in USD	Three arbitrators - average - in USD	Adm. fees (including reg. fee) in USD	Total w. one arbitrator in USD	Total w. three arbitrators in USD
100,000	ICC	10,060	30,179	5,365	15,425	35,544
	SCC	8,853	19,477	3,952	12,805	23,429
	SWISS	8,000	20,000	5,000	13,000	25,000
	ICAC	3,330	9,990	7,770	11,100	17,760
	VIAC	6,006	16,516	3,900	9,906	20,416
	DIS	6,718	17,053	1,959	8,677	19,012
	FTCA			259 reg. fee + 8,378		8,637
500,000	ICC	26,924	80,771	14,165	41,089	94,936
	SCC	20,865	45,903	10,478	31,343	56,381
	SWISS	35,000	87,500	5,000	40,000	92,500
	ICAC	7,080	21,240	16,250	23,330	37,490
	VIAC	17,712	48,708	8,255	25,967	56,963
	DIS	17,116	43,451	6,719	23,835	50,170
	FTCA			259 reg. fee + 16,101		16,360
1,000,000	ICC	39,379	118,136	21,715	61,094	139,851
	SCC	31,112	68,445	15,750	46,862	84,195
	SWISS	55,834	139,584	5,000	60,834	144,584
	ICAC	9,180	27,540	21,420	30,600	48,960
	VIAC	28,652	78,793	12,271	40,923	91,064
	DIS	27,359	69,451	12,669	40,028	82,120
	FTCA			259 reg. fee + 23,601		23,860
10,000,000	ICC	113,284	339,851	57,515	170,799	397,366
	SCC	88,794	195,347	33,511	122,305	228,858
	SWISS	156,445	391,111	26,667	183,112	417,778
	ICAC	22,380	67,140	52,220	74,600	119,360
	VIAC	85,254	234,448	25,200	110,454	259,648
	DIS	88,499	224,650	38,463	126,962	263,113
	FTCA			259 reg. fee + 58,038		58,297

arbitral institutions. As Table 3 confirms,<sup>58</sup> there might be significant differences when it comes to this issue. e.g. arbitrating a case before ICC Court of Arbitration or Swiss Chambers may be more than three times expensive than arbitrating a claim before Serbian FTCA or Russian ICCA, and almost twice expensive than bringing a claim before DIS or VIAC. For this reason, it is our firm view that this element of arbitration institution, and not only its reputation, rules or seat of arbitration, should be carefully considered when conferring a jurisdiction to a specific arbitral institution. Choosing one arbitration institution over the other, if significantly more costly, may impose an unnecessary financial burden on the parties or even prevent a party from filing a claim if unable to make the advance on costs.

The abovementioned costs are only the costs of the arbitration proceedings and do not include legal fees that may be charged by the party's attorney representing the case before arbitration. These costs contribute immensely to the overall costs of arbitration,<sup>59</sup> and may also vary greatly depending on the law firm selected, a decision which may be impacted not only by the chosen seat of arbitration (parties usually opt for lawyers situated in the seat of arbitration), but also by the agreed upon applicable law and language of the proceedings. These are also important factors which should, although rarely are, considered when agreeing to arbitration, as these clauses are often referred to as 'midnight clauses' since their stipulation usually comes at the end of the exhausting negotiation process.

Finally, when choosing the proper dispute resolution venue, it is important to pay due regard to provisions of the rules applicable to arbitration proceedings which set

the allocation of the costs of the proceedings amongst the parties to dispute. While it is often the case that the allocation as per 'success in dispute' is provided, this may not always be the case.<sup>60</sup> This also should bear prevalence in making the right choice of the institution best suited to take upon the case that might result if the contract ends with a dispute instead of a mutual benefit.

## Conclusion

It has been demonstrated that most of the advantages of arbitration as dispute resolution mechanism stem from the fact that arbitral dispute resolution gives great leeway to party autonomy on the one hand, while on the other, it ensures both the confidentiality of the proceedings and effectiveness of the final award. The parties are given the opportunity to tailor the dispute resolution mechanism as they see fit, subject to few mandatory provisions and fundamental principles of the applicable law on arbitration. In particular, the parties are given the freedom to choose the arbitrators, seat of arbitration, language of the proceedings, rules of proceedings as well as the applicable substantive law. The selected arbitrators need not to be lawyers and are usually experts in the subject matter of the dispute, whilst at the same time their independence and impartiality is ensured by relevant applicable rules and laws. The choice of law made by the parties as well as prevalence to application of trade usages and standards applicable in their line of business can only be fully upheld by professional who understand the core of the business disputed in arbitration. It is precisely why the freedom of the parties to compose an expert oriented panel of arbitrators with relevant experience in the field of trade to which the dispute is attached can insure not only expedite procedure but a professional and fully informed award.

Independence of arbitration proceedings from national courts further emphasizes the advantages of arbitration

58 The information provided in this table is based on the FTCA Scale of Costs and Fees, DIS Cost Calculator (<http://www.dis-arb.de/en/22/costcalculator/overview-id0>) and a 2013 report prepared by Louis Flannery and Benjamin Garel [10]. The further findings of this survey show that the most expensive institutions in 'small cases' (up to USD 100 million) become more affordable in 'big cases' (worth USD 500 million and USD 1 billion), whilst the more affordable centers in 'small cases' become the most expensive in 'big cases', e.g. CIETAC, which is amongst the cheapest arbitral venues for resolution of the small cases, in cases with the amount in dispute of USD 500 million charges USD 2,4 million and thus qualifies for the most expensive centre – more than four times expensive than the Swiss Chambers!

59 According to 2006 Queen Mary arbitration survey, in 64% of the cases, attorneys' fees were greater than 50% of the total cost of arbitration [20].

60 Article 18 of the Serbian LA states that the parties will bear the costs of arbitration in the amount determined by the arbitral tribunal. Neither the Law on Arbitration nor the FTCA Rules contain a provision specifying how these costs are to be allocated amongst the parties. However, the practice of the FTCA reveals a common pattern in this respect – the final apportionment of the costs reflects the relative success of the parties. This rule applies to recovery of attorney's fees too, up to the amount that is deemed reasonable and justifiable.



in commercial and investment disputes that involve entities from different jurisdictions. Arbitration offers not only a more neutral forum, but also a more efficient and less formal setting as compared to national courts, with clear safeguards to the privacy and confidentiality of the proceedings. At the same time, the arbitration enables the parties to efficiently manage duration and the costs of the proceedings, which are the essential elements for consideration to business parties in every dispute. Last but not least, the fact that the arbitration award has the force of final and binding court judgment, and the fact that globally recognized mechanisms exist providing for facilitated and expedited enforcement of the international arbitration awards, perfectly rounds up the needs of businesses for an efficient, foreseeable, cost-effective, expert-reliable and enforceable dispute resolution mechanism.

For all these reasons, Serbian business community should pay special attention to arbitration as mechanism for dispute resolution, when deciding on a dispute resolution policy for their contracts. Serbian business people should not disregard the long tradition of arbitral dispute resolution in Serbia, the modern – UNCITRAL Model law compliant – legal framework and the expertise of local legal community in arbitration, as arbitration may significantly contribute to reduction of the transaction costs, enhancement of their overall performance and efficiency, and consequently to improvement of business environment in Serbia. Last but not least, the cost considerations should not be disregarded both when agreeing to arbitration in Serbia, and when agreeing to arbitration elsewhere, as well as the need for consulting an experienced arbitration practitioner in this decision-making process.

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