# ARBITRABILITY OF DISPUTES: ROLE AND IMPACT ON DEVELOPMENT OF INTERNATIONAL ARBITRATION

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Nowadays international arbitration is quite a growing trend which has been developing side by side with incessantly increasing international trade, investment and globalization of commerce; it is widely recognized that businesses prefer arbitration over litigation for cross border disputes, e.g. over two thirds (69%) of in-house counsel in financial services companies felt international arbitration is suited to resolving their transnational disputes, 35% reported a rise in the number of international disputes following the financial crisis in 2008 [6] etc. Although arbitration has been established for hundreds years ago,[16] in its initial period there was no international legal framework as to arbitrability of disputes or awards enforcement, and national courts could largely intervene in any arbitration proceedings,[17] making the arbitral award difficult to enforce. But at the beginning of the twentieth century it began to change, especially with the establishment of the International Chamber of Commerce, adoption of the Geneva Protocols 1923 and 1927,[18] and finally the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter – the NYC). By the 1980th, aiming to boost economy, developing countries began to provide friendlier environments to foreign investment and international trade; consequently, with the increase of international transactions and disputes respectively, countries accepted international arbitration limiting judicial authority through making more subject-matters arbitrable. As a result, the UNCITRAL Model Law on International Commercial Arbitration and based on it in whole or part corresponding national laws on international arbitration were adopted throughout the world[19].

In its narrow sense the term "arbitrability" covers disputes capable of being resolved by arbitration; it is sometimes given a broader meaning

[16] For example, in the Anglo-American legal system, there is evidence of recourse to commercial arbitration dating back to at least the fourteenth century [13;175].
[17] It was due to the concept that "it is against sovereign dignity to submit ant type of dispute to resolution system not controlled by the state itself " [2;9]
[18] Article 1 already envisaged that to obtain recognition or enforcement, it shall be necessary that the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon [7]; in fact, many provisions of this Convention were used in the NYC.
[19] A typical example of this trend can be seen in Latin America, where beginning from the 1980th most countries adopted the NYC, the Panama Convention and national arbitration laws [19;1103].

covering also the existence and validity of the parties' consent to arbitration (so-called "subjective" arbitrability), as is the case with the terminology used by the U.S. Supreme Court, but it is not widely used in international practice, though. Here it is to do with the narrow sense of the term which is also known as "objective arbitrability" (whether the subject-matter of the dispute submitted to arbitration is not one which can be resolved by arbitration) [4;312-313] and the issue of public policy which all together are overlapping notions (since arbitrability is purely a matter of policy and it is traditionally defined in terms of public policy) covering arbitrability of disputes all the way, whose role and impact on the development of international arbitration are examined and described in this article. This article is concerned with international commercial arbitration only; arbitrability of disputes in the realm of international investment arbitration and other involving states is not examined[20].

Objective arbitrability establishes the criterion of jurisdiction in a particular dispute and determines the scope of international arbitration as a whole. For instance, in the 1991 Ganz case the Paris Court of Appeals held that: "…in international arbitration, arbitrators are entitled to determine their own jurisdiction with regard to the arbitrability of the dispute in the light of international public policy…"[4;336-337]. Therefore, the issue of objective arbitrability is essential form the very beginning - when concluding an arbitration agreement[21] and when taking cognizance of the dispute by an arbitral tribunal, if it then comes to the dispute. As opposed to the award enforcement stage, at this one there are no detailed rules or restrictions and to be capable of settlement by international arbitration the subject-matter in question should be so according to applicable law: 1) treaties, conventions and other international acts (the NYC, Panama Convention, European Convention on International Commercial Arbitration, UNCITRAL Model Law, etc); 2) applicable law of a particular country. Although this two-leveled legal framework may cause some discrepancies (not just in laws – an arbitrator may treat the arbitrability issue differently than a judge asked to enforce an award), such a generally defined arbitrability approach laid down in these international sources provides flexibility for national arbitration laws, emerging relations and disputes, gives an effective guide direction to the contracting states.

Nonetheless, this is not the only concern as it becomes more critical when enforcing the award in a particular state with its own legislative

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[20] As it is reasonably pointed out by legal scholars that international commercial arbitration should be distinguished from international investment arbitration and public arbitration as the latter ones are treaty based procedures rooted in public international law [7;3], [14;8].

[21] However, the question of whether the subject matter can be referred to arbitration is different from what type of dispute falls within the scope of an arbitration agreement; the letter is the question of arbitration agreement interpretation, which has nothing to do with objective arbitrability [2;5].

attitude towards arbitrability of disputes. In principle, the award that has been correctly rendered in the claimant's favor by an international arbitral tribunal does not require enforcement by a national court if it is carried out by the respondent; but the reality is that the respondent will often evade carrying out the terms of the award or use the award as a bargaining tool with the claimant. When this situation occurs, the claimant is provided a remedy under the NYC - he can seek enforcement of the award either in the national court of the seat of arbitration or the court of the country in which the respondent has its assets. This leads us to another intricate yet significant role of arbitrability of disputes – the criterion of award enforceability (if a dispute is arbitrable in a particular state, accordingly it can be enforced there), as in particular Article V2 of the NYC envisages that recognition and enforcement of the arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that: 1) the subject-matter of the difference is not capable of settlement by arbitration under the law of that country[22]; 2) or the recognition or enforcement of the award would be contrary to the public policy[23] of that country. Interestingly, the arbitrability related provisions in the UNCITRAL Model Law and the Panama Convention are almost identical as those in Article V2 of the NYC. However, inarbitrability in one country does not hamper or prevent arbitrability of a dispute in another country where it is arbitrable, provided that the recognition and enforcement will be in that country; some legal scholars call it "presumption of arbitrability of disputes, if otherwise is prescribed by law"[10].

Therefore, public policy and derived from it capability of settlement are overlapped concepts that determine enforceability. Perhaps this is what international arbitration will always stumble over because any legal system by far wishes to ensure that certain matters considered to be sensitive are decided in accordance with the interests of society; public policy [international][24] itself is vague, uncertain, has been interpreted and applied differently from country to country depending on its political, religious, social, cultural, and economic systems. Moreover, since objective arbitrability emanates from party autonomy, it is opposed to public policy and therefore in international arbitration objective arbitrability can be perceived as both the point of tension and the buffer between party autonomy and public policy; to conform them there have been developed

[22] Objective arbitrability is mentioned separately from public policy since laws restricting arbitrability may not necessarily be part of public policy; however, these are two interrelated angels of arbitrability.

[23] The New York Convention is intended to challenge only international public policy grounds [2;12].

[24] Here in the article we imply international public policy – when an international element gets involved, either from the underlying transaction's nature or from the nationality of the parties; it should be distinguished from domestic and transnational public policies [2;10].

three methods: the first simply consists in excluding from arbitration disputes which are perceived as involving the questions of public policy (e.g. criminal or family law); the second entails excluding from arbitration all the disputes where one of the parties has violated a rule of public policy (e.g. a contract containing the arbitration clause contravenes antitrust rules); the view of these two methods that all the disputes "implicating public policy" are non-arbitrable prevailed in 19th and early 20th century; the third method, manifesting pro-arbitration attitude, consists in allowing the arbitrators to hear also disputes related to a matter of public policy, while the courts will be then able to review the public policy issue if an action is subsequently brought to enforce or set aside the resulting award [4;332-336]. For instance, the Paris Court of Appeals in the 1991 Ganze case held that: "…in international arbitration, an arbitrator… is entitled to apply the principles and rules of [international] public policy and to grant redress in the event that those principles and rules have been disregarded, subject to review by the courts..."[4;336]. In some way, this approach removed public control farther to the award enforcement stage, which gave the parties more freedom at the initial stages of international arbitration.

Furthermore, the main distinguishing characteristic of objective arbitrability complicating international arbitration is that there are a great deal of national legislative differences in the legal determination, which directly impacts the efficiency of the application of Article V2 (a) of the NYC and those other dealing with the issue of arbitrability. That is why it is so important to have a clear and coherent approach to this issue, yet it is not that easy in practice.

Generally, there are a number of different criteria to determine arbitrability of disputes: disputes involving an economic interest (in Swiss "any dispute of financial interest may be the subject of an arbitration" (Art. 177) [16]; in Germany "any claim involving an economic interest can be the subject of an arbitration agreement" (Sec. 1030)[17]); depending on a type of legal relationships (in China these are disputes arising from "economic, trade, transport or maritime activities" and contacting a "foreign element"(Art. 257) [15]), (in Japan "unless otherwise is provided by law…subject matter is a civil dispute that may be resolved by settlement between the parties (excluding that of divorce or separation" (Art.13)[18]); concerning rights of full dispositions, etc. Yet, the majority tends to state that most matters not involving an economic interest are non-arbitrable; besides, as for the criterion of full disposition rights, there are uncertainties and peculiarities as to inalienable rights and those raising other sensitive issues, for the notion of inalienability is somewhat elusive and even though rights which do not involve an economic interest are considered to be in alienable, a number of rights which do involve an economic interest are still deemed to be inalienable [4;340-341]. Typical confusions can be seen in intellectual property rights, e.g. validity of a patent in Europe is a matter of

the exclusive jurisdiction of the courts at the place of registration of the patent, while the commercial use of the patent may well be the subject matter of arbitral proceedings [13; 181-182]. Clearly, the only use of such criteria is by no means sufficient or suitable; therefore, among with arbitrability provisions usually there are different non-arbitrable ones excluding certain subject-matters of disputes; thus a well-prepared list of exceptions, so-called "non-arbitrable block", and clear definition of arbitrability are essential for international arbitration as it ensures sufficient predictability and certainty.

This problem can be seen in the legislation of Ukraine that contains some uncertainties related to arbitrability of disputes as the category of non-arbitrable disputes (related to real estate, corporate, labor and administrative disputes, related to consumers, etc.) is not clearly defined by the legislature (e.g. some of corporate disputes may be arbitrable, while others may not)[1;31-32]. Moreover, a number of disputes, which are non-arbitrable in Ukraine, are arbitrable in many other countries; thus, it may well impede or complicate the use of international arbitration in the disputes involving "Ukrainian element."[25]

In addition, the U.S. perspective on arbitrability of disputes, which is somewhat different yet more pro-arbitration than in other countries, should be also considered. The accession to the NYC and the amendment of the Federal Arbitration Act 1925 had a great impact on the arbitrability doctrine in the U.S., as depicted by the evolution of the U.S. Supreme Court's attitudes towards the arbitrability claims. While the FAA does not explicitly restrict what type of disputes should be non-arbitrable, the Supreme Court has concluded an approach to the arbitrability claims by looking at the arbitration clause between the parties; if the arbitration clause is broad enough, such a claim, even it arises from mandatory law or designed for social policies, will be arbitrable; however, if there is clear evidence to the contrary, such as a reduced ability to arbitrate the claim in particular, the dispute might be non-arbitrable[2;42]. As mentioned, the U.S. applies the broader meaning of the term of arbitrability tending to be reluctant to use public policy as grounds for refusing the enforcement of the arbitral award, for the U.S. Supreme Court has found that it is necessary for the domestic courts to support the notion of arbitrability [2;43] and indicated that commercial international arbitration is to be treated even more favorably than domestic arbitration [7;4]. It is also pertinent to add that arbitrability tends to expand, which indicates a growing role of international arbitration. For example, with withdrawal by France of the NYC commercial reservation, there became arbitrable some disputes of antirust, intellectual

[25] For example, in the case Telenor Mobile Communications v. Storm L.L.C., (two companies, Telenor and Storm, jointly owned a Ukrainian company called Kyivstar) the New York court enforced the award even though it violated Ukrainian antimonopoly law [2;34].

property, bankruptcy, labor and corporate law, despite the fact that these subjects are considered to be sensitive from a public policy standpoint [4;341-342].

Based on the aforementioned, it can be concluded that arbitrability of disputes has a huge impact upon international arbitration which evolved throughout the world notably because of the proper development of the arbitrability concept both at international and national levels. In fact, in those countries with a wide range of arbitrable subject-matters international commercial arbitration may no longer be regarded as "alternative" means of resolving disputes. From my viewpoint, the reason why arbitrability of disputes is of such importance to international arbitration rests upon a matter of fact that it performs a set of fundamental functions (role of arbitrability of disputes): it is the criteria of jurisdiction in a dispute in particular; it outlines the scope of international arbitration in general; it excludes some delicate matters from the scope of arbitration so that protect them; it is the buffer between party autonomy and public policy, which gradually drifts into the favor of party autonomy; it is the criterion and assurance of enforceability; it is a tool and starting point to unify international arbitration, etc.

Therefore, clearly developed arbitrability of disputes provides much needed predictability and certainty so that lower the risks of international economic activity. International arbitration, arbitrability of disputes in particular and international commerce in general are highly interrelated, interactive, and intercorrelative, e.g. while economical reasons of international commerce prompted countries to make more subject-matters arbitrable, the development of arbitrability and international arbitration also promoted and facilitated international commerce by providing more opportunities to have effective dispute settlement by international arbitration.

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