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NON-ARBITRABILITY: NATIONAL, INTERNATIONAL AND TRANSNATIONAL APPROACHES TO DEFINE THE MATTERS

The article is devoted to analysis of non-arbitrability doctrine application. The terms are considered that enable a dispute to be submitted to and settled by arbitration, and also the consequences of violation of non-arbitrability provisions, those that are reflected in annulment of arbitral award or in refusal of its recognition and enforcement by national courts. Non-arbitrability grounds are invoked by national courts ex officio, even though the list of non-arbitrable matters is not universal. The article considers the approaches to define the list of subject matters of non-arbitrability that gradually transfer from domestic and international levels towards transnational one following the pro-arbitration tendency. The article develops the approaches to classify subject matters of non-arbitrability to objective and subjective, positive and negative, procedural and substantive. Comprehensive materials allow to hold a comparative analysis of jurisdictional practices. The aim of this article is to examine growth prospects and development of practical approaches to define the grounds for non-arbitrability in the world.

Keywords: Arbitrability, Non-arbitrability, Transnational Law, Recognition and Enforcement, Annulment, Arbitral Award.

1. INTRODUCTION

Arbitrability serves for defining the capability of the dispute to be resolved through arbitration, while non-arbitrability is one of the grounds for refusal in recognition and enforcement of arbitral award by national court on its own motion that is stipulated at international level and implemented by majority of the jurisdictions – parties to the New York Convention[1], the European Convention[2], the Panama Convention[3] and the UNCITRAL Model Law that additionally recognizes it as a ground for setting aside arbitral award[4].

Non-arbitrability doctrine provides that some disputes, involving private rights, may be covered by exclusive national jurisdiction, thus losing an ability to be resolved by private arbitration[5]. Non-arbitrable matters, primarily being developed as a kind of defense of state sovereignty along with matters of public

[1] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958*, art. V(2)(a) (United Nations). *The New York Arbitration Convention* <http://www.newyorkconvention.org/english> (2020, November 12) – the Convention gathered 163 jurisdictions and continues to expand its application.

[2] *European Convention on International Commercial Arbitration, 1961,* art. VI (United Nations). *International Council for Commercial Arbitration* <https://www.arbitration-icca.org/media/4/49305067580462/media113534204360520hascher_commentary_on__the_european_convention_1961.pdf> (2020, November 12) – the Convention has 31 parties.

[3] *Inter-American Convention on International Commercial Arbitration, 1975*, art. V(2)(a) (OAS). *The Organization of American* States<http://www.oas.org/en/sla/dil/inter_american_treaties_B-35_international_commercial_arbitration.asp> (2020, November 12) – it unites 19 parties, all of which are parties of the New York Convention.

[4] *Model Law on International Commercial Arbitration, 1985*, art. 34 (2)(b)(i), art. 36 (1)(b)(i) (UNCITRAL). *United Nations Commission On International Trade Law* <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration> (2020, July 04) – it is implemented by 111 jurisdictions.

[5] Born, G. B. (2009). *International Commercial Arbitration.* Alphen Aan Den Rijn: Wolters Kluwer Law &Business, 768.

policy, have not been even roughly standardized yet. On the one side, this fact provides for unique national practices of non-arbitrability doctrine application, while, on the other side, the issue whether there is a place for non-arbitrability and in which form non-arbitrability may be applied in private relations within transnational environment arises. Hereinafter, there are considered national, international and transnational approaches to define arbitrable and non-arbitrable matters in different jurisdictions considering whether they are: objective or subjective by the type; legally regulated in positive or negative manner; of procedural or substantive legal nature.

For the purpose of this article to demonstrate variety of arbitrable mattes and prospects of their transformation, a range of legal sources have been analysed, including legal collections of Global Legal Group[1] and Global Arbitration Reviews of European[2], Americas[3], Middle Eastern and African[4], Asia Pacific[5], European and Middle Eastern arbitration[6].

2. OBJECTIVE AND SUBJECTIVE ARBITRABILITY

Difference between objective and subjective arbitrability lies in fact that first as *ratione materiae refers* to quality of the matter of the dispute, while second as *ratione personae refers to* parties' status and capacity to submit dispute to arbitration.[7] Despite superficially the terms look alike, Articles V(1)(a) and V(2)(a) of the New Convention draw a clear distinction between them. Thus, finding a party under some incapacity is a ground for recognition and enforcement of arbitral award to be refused just according to justified claim of such party, while incapacity of subject-matter of the dispute is a ground for refusal by national court ex officio. The same distinction is provided by the UNCITRAL Model Law in Articles 36(1)(a)(i) and 36(2)(b)(i) for recognition and enforcement of arbitral award, and in Articles 34(2)(a)(i) and 34(2)(b)(i) for setting aside. Thus, under international regulations just objective arbitrability constitutes an arbitrability *per se*.

Herewith, at national level the exceptions may be found. For example, incapacity of the party to participate in transaction makes dispute non-arbitrable in Argentina and Botswana. Group rights of both physical persons and legal entities are non-arbitrable in Russia. Noteworthy is the approach of the Supreme court of Ukraine in *Ostchem v. Odessa Port Plant* that equated subjective and objective arbitrability by obliging courts to examine both of them ex officio[8].

Both subjective and objective arbitrability are generally verified by the parties, when they refer to arbitration and by arbitral tribunal following *kompetenz-kompetenz* doctrine. Generally, national courts are empowered to examine just objective arbitrability at stages of annulment, recognition and enforcement without any rights to raise an issue of parties' capacity, if neither of the parties claim for that. Providing national courts with power to verify subjective arbitrability on own motion contradicts with international doctrine being more burdensome.

3. POSITIVE AND NEGATIVE APPROACHES TO ARBITRABILITY

Positive and negative approaches to define arbitrability differ by expressing matters capable or incapable to be settled by arbitration.

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[1] International Arbitration Laws and Regulations 2019. *ICLG* <https://iclg.com/practice-areas/international-arbitration-laws-and-regulations> (2020, August, 25).

[2] GAR (2020). *European Arbitration Review* <https://globalarbitrationreview.com/review/the-european-arbitration-review/2020> (2020, August, 25).

[3] GAR (2020). *Arbitration Review of the Americas* <https://globalarbitrationreview.com/series/the-arbitration-review-of-the-americas> (2020, August, 25).

[4] GAR (2020). *The Middle Eastern and African Arbitration Review* <https://globalarbitrationreview.com/series/the-middle-eastern-and-african-arbitration-review> (2020, August, 25).

[5] GAR (2020). *Asia Pacific Arbitration Review* <https://globalarbitrationreview.com/series/the-asia-pacific-arbitration-review> (2020, August, 25).

[6] GAR (2020). *European & Middle Eastern Arbitration Review*. <https://globalarbitrationreview.com/series/the-european-middle-eastern-arbitration-review> (2020, August, 25).

[7] Di Pietro, D. (2009). General Remarks on Arbitrability under the New York Convention. In: Mistelis L., Brekoulakis S. (eds.). *Arbitrability: International & Comparative Perspectives.* Alphen aan den Rijn: Kluwer Law International, 85-91; Bernardini, P. (2008). The Problem of Arbitrability in General. In: Gaillard E., Pietro D. (eds.). *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice.* London: Cameron May, 501-503.

[8] *Постанова по справі №519/15/17, 2018* (Верховний Суд України). *Єдиний державний реєстр судових рішень* <http://reyestr.court.gov.ua/Review/75717009> (2020, July, 10).

Positive approach involves defining the scope and frames of arbitrability by naming the branches of law, matters within which are generally arbitrable. Thus, the positive approach is prevailing at international level. For instance, the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards in Article 1 stipulates the scope of arbitrability in positive manner providing that arbitral awards may be made in civil, commercial or labour proceedings. At the same time the Convention defines the frames of arbitrability that may be established at jurisdictional level by limiting application of the Convention to compensatory judgments involving property by the state at the time of ratification. In fact, only Mexico makes an express reservation of limiting its application to punitive judgments involving property[1]. Another example of positive approach is demonstrated by the Panama Convention that in Article 1 defines the differences related to commercial transactions as arbitrable.

In more details arbitrable matters are presented by Article 1 of the Moscow Convention providing that arbitrability covers contractual and other civil law disputes between economic organizations that arise from contracts of purchase, specialization and cooperation of production, carrying out of building and construction works, on assembling, projecting, prospecting, research, designing and exploratory development, transport, forwarding and other services as well as other civil law cases arising in course of economic and scientific and technical cooperation between the parties to the Convention[2].

Positive approach to define arbitrability at jurisdictional level widely reflects in defining substantive arbitrable matters, for example: (1) commercial as in Bulgaria, Brunei, Columbia, Costa Rica, Finland, Germany, Indonesia, Italy, Japan, Kosovo, Nigeria, Russia, Singapore, Spain, Switzerland, Ukraine, the US and Vietnam; (2) of economic interest as in Austria, Germany, Liechtenstein, Portugal, Switzerland and Ukraine; (3) financial and monetary as in Korea, Portugal and Switzerland; (4) of pecuniary nature as in Belgium and Slovenia; (5) property as in Bulgaria, China, Czech Republic, Estonia, Georgia, Korea and Poland; (6) disposable as in Angola, Brazil, Luxemburg, Portugal; (7) when consequences of the dispute may be determined by the parties as in Netherlands; (8) contractual or disputes that may be settled by the parties as in Andorra, Belgium, Brunei, China, Colombia, Costa Rica, Denmark, Finland, Georgia, Germany, Indonesia, Italy, Japan, Korea, Lebanon, Macedonia, Mozambique, Portugal, Slovenia, Spain and Sweden. The jurisdictions compose positive arbitrability from several matters. First defines material nature of arbitrable matter as commercial, economic, financial, pecuniary or property character (1-5 groups). Second relates to ability of the subject of the dispute to be alienated, disposed or the dispute to be settled independently by the parties (6–8 groups). For example, Germany is included into the first, second and eighth groups, while Slovenia to fourth and eighth. Should be noted the approach of Ukraine, where disputes are arbitrable, if they arise within civil relations concluded for international commercial or economic purposes[3].

Positive approach may be applied to define both substantive and procedural arbitrable matters. Procedural matters in positive manner may be defined by giving an advantage of arbitrability to the disputes, if ordinary courts have jurisdiction over them as in Liechtenstein and Poland. Application of positive approach to define substantive and procedural arbitrable matters is not colliding. For example, arbitration community of Ukraine is lobbying for extension of substantive arbitrability to all civil law aspects and procedural arbitrability to all matters under exclusive jurisdiction of domestic courts[4].

Negative approach *vice versa* reflects in defining non-arbitrable matters or granting national courts with exclusive jurisdiction as in the EU[5], Kosovo, Macedonia and Vietnam. However, covering the matter

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[1] *Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, 1979* (OAS). *Organization of American States* <https://www.oas.org/juridico/english/treaties/b-41.html>. (2020, November 12).

[2] *Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-Technical Cooperation, 1972*, XXIX, 102-105 (USSR). *Arbitration Association* <http://arbitrations.ru/userfiles/file/Law/Treaty/Moscow%20Convention.pdf>. (2020, November 12) – primarily the Convention included Bulgaria, Czechoslovakia, the GDR, Hungary, Mongolia, Poland, Romania, the USSR and later Cuba. Currently the list of parties has been reduced to Cuba, Mongolia, Russia, partly is applied in Bulgaria (in regard to state enterprises) and Ukraine (in fact, not applicable anymore).

[3] *Закон про міжнародний комерційний арбітраж ст.1(2), 1994* (Верховна Рада України) *Відомості Верховної Ради України*, 25, 198.

[4] UAA (2020). *Working Group I – On Improving of Ukrainian Arbitration Legislation in the Field of International Arbitration and arbitral proceedings* <http://arbitration.kiev.ua/en-US/Arbitration-Association/Working-Groups.aspx?ID=42> (2020, July, 15).

[5] *Regulation (EU) No.1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012*, art. 24 (European Parliament and Council). *European Union law* <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32012R1215> (2020, July, 15).

under exclusive jurisdiction of the national court should not be taken as excluding of arbitrability[1]. Following pro-arbitration tendency capability of the dispute to be settled by arbitration should be examined on a stand-alone basis under common transnational or at least international principles. Hereinafter, comprehensive analysis of negative approach application is provided for the purposes of procedural and substantive arbitrability examination. Herewith, generally, positive and negative approaches are applied in combination as complementary.

4. PROCEDURAL AND SUBSTANTIVE ARBITRABILITY

The capacity of the matter to be settled by arbitration may be defined considering its legal nature, whether it is procedural or substantive, as well as by which kind of law the issue of arbitrability of a specific matter is defined.

Should be noted that issues of arbitrability, considering national law codification practices may be regulated by procedural, substantive, specific arbitration laws or cumulatively by them that reflects national perception of the institute of arbitrability and its place within national legal system.

Procedural sources of law such as Codes of Civil Procedure govern the issues of arbitrability in Belgium, Bulgaria, Estonia, Luxemburg, Russia and Vietnam. Special arbitration acts are adopted in Andorra, Angola, Bermuda, Bolivia, Botswana, Brunei, China, Columbia, Costa Rica, Ireland, Japan, Kenya, Kosovo, Korea, Malaysia, Mozambique, Peru, Spain and Zambia. Substantive law governs the issue of arbitrability, for example, within provisions of Private International Law Acts as in Macedonia and Switzerland, Consumer Protection Act in Bulgaria, Sea Act in Australia, Civil Code in Philippines. Also, arbitrability is governed by substantive law in Armenia, Ireland, Mexico, Tanzania and Vietnam.

In some jurisdictions, legislation on arbitrability is mixed of substantive and procedural acts as in Argentina, Liechtenstein and Ukraine or of substantive and arbitration acts as in Brazil and Lebanon or of procedural and arbitration acts as in Australia, Ecuador, Egypt, Russia and Turkey.

In Australia, the UK and the US, as common law jurisdictions, case law takes place. The tendency is for legal regulation development to follow the case law findings that is also true for majority of civil law jurisdictions. National courts are first who face with gaps in legal regulation and at the same time usually empowered to interpret the law. Hereinafter, selected national court rulings will be demonstrated as throwing light on legal perception and creating new legal environment.

4.1. Procedural Arbitrability

Procedural arbitrability is about technical capability of the dispute to be settled by arbitration considering time limitations, compliance with requirement to apply to pre-judicial or pre-arbitral dispute resolution techniques as mediation or requirement to properly inform the other party about intentions to refer to arbitration[2]. Also procedural non-arbitrability involves such matters as invalidity of arbitration agreement, finding the dispute as exceeding the scope of arbitration agreement, violation of the terms of arbitration agreement, settlement of dispute by arbitral tribunal in a manner that is technically non-enforceable under *lex fori*.

Herewith, matters of procedural arbitrability generally are governed by Article V(1) of the New York Convention, Article IX(1) of the European Convention, Articles 34(2)(a) and 36(1)(a) of the UNCITRAL Model Law that shall be applied at request of the party against whom arbitral award is invoked. Thus, applying to procedural arbitrability as a pure arbitrability is scientifically unsound[3].

4.1.1. Arbitrability of Administrative and Enforcement procedures

Issues arising from *administrative and enforcement procedures* at legislative level are defined non-arbitrable in the EU and at national level in Brazil, Bulgaria, Czech Republic, China, Japan, Kosovo, Mexico, Netherlands, Macedonia and Russia. The *issues of enforceability* of arbitral awards, in particular, whether the method of enforcement suggested by the arbitral tribunal is proper in relation to subject matter, is not against public policy and accomplishable in the state of enforcement. While, recovery of losses and monetary compensation are generally applicable, ability to enforce arbitral awards for non-monetary relief is rather

[1] Poudret, J.-F., Besson, S. (2007). *Comparative International Commercial Arbitration.* London: Sweet & Maxwell Ltd, 255.

[2] Thomson Reuters (2020). *Glossary 'Procedural Arbitrability'* <https://uk.practicallaw.thomsonreuters.com/9-501-5600?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> (2020, September, 19).

[3] Brekoulakis, S. L. (2009) Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori. In: Mistelis L., Brekoulakis S. (eds.). *Arbitrability: International & Comparative Perspectives.* Alphen aan den Rijn: Kluwer Law International, 99-115.

disputable in some jurisdictions. In Chile, it has a matter whether an arbitral award is final and enforceable under the law, where it was made, as well as whether it has a direct effect on assets located in Chile. In a number of jurisdictions arbitral awards granting non-monetary relief may be enforced, if they include method of enforcement foreseen by national legislation, for example: in Canada, if arbitral award grants an order for recovery or delivery of possession of land or of personal property, performance or abstaining from an act; under Czech law – eviction from real property, confiscation, division an object under joint ownership; in South Africa – recovery or delivery of possession of land or personal property, or requiring a person to do, or to abstain from doing an act. No restrictions on recognition and enforcement of arbitral awards granting non-monetary relief are provided for in Argentina, Austria and Belgium.

In Ukraine, the Civil Law Code sets the list of recommended legal remedies, including non-monetary relief, among which are: recognition of right, recognition of transaction null and void, termination of action that violates the right, recovery of state that existed before violation, compulsory specific performance, amendment or termination of legal relations[1]. Application of any other remedies is possible under Ukrainian law, despite, in fact, they may appear to be unenforceable. Thus, if a dispute inherently capable to be arbitrated may result only in application of remedy that is unenforceable according to the law of the state of enforcement, then such dispute may be recognized as non-arbitrable in its entirety.

4.1.2. Arbitrability of Subjects to State Registration

Disputes involving subjects to state registration are recognized as non-arbitrable in the EU[2], Macedonia, Russia and Ukraine[3]. Registration formalities usually are required for the matters that are important for state and society, that have *erga omnes* effect, for example, real estate, corporate issues, intellectual property.

There is a view, that such matters are non-arbitrable not on procedural basis that has a preliminary character – these issues are a subject to state registration, because they are of state or public interest. Thus, in such case, the ground for refusal in recognition and enforcement should be violation of domestic public policy, rather than arbitrability, if such takes place.

Options, enabling arbitrability of subjects to registration, may include: automatic recognition of arbitral award as a ground for state registration or if arbitral award is recognized by national court, the ground for state registration will be a decision of national court (under exequatur). While enforcement of the first option is related to extension of arbitral award's binding force on state registrar that is non-signatory, the second option exhaustively protects state interests and allows national courts to check arbitral award ex officio.

Exequatur, for such purposes, may serve for both compulsory and voluntary execution of arbitral award. For example, the mechanism of recognition and granting permission for voluntary execution of arbitral award on recovery of monetary funds is provided for in Ukraine[4]. It has been incorporated into Ukrainian legislation in order to enable debtors to voluntarily execute arbitral awards within currency restrictions. Similar mechanism probably would be effective for ensuring voluntary execution related to registration formalities.

Thus, there are no obvious procedural obstacles for recognition of subjects to state registration as non-arbitrable, besides public interest under a veil. If the subject to registration is of special public interest, it should be evaluated and in enforcement of the arbitral award should be rejected on this ground. Thus, matters of corporate, intellectual property or real estate relations burdened by registration formalities should not be excluded from arbitrability under procedural reasons.

Approach to exclude all subjects to state registration from arbitrability appears as extremely unfriendly to arbitration as it does not provide even an ability to evaluate the consequences of arbitration, let alone evaluation of the consequences of award's execution.

4.1.3. Arbitrability of Disputes Involving Non-signatories

One more criterion for dispute's non-arbitrability is extension of award's binding force to non-signatories. Non-signatories may include persons, who are not parties of arbitration agreement, or who join

[1] *Цивільний кодекс 2003,* ст.16 (Верховна Рада України). *Відомості Верховної Ради України*, 40-44, 356.

[2] *Regulation (EU) No.1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012,* art. 24 (European Parliament and Council). *European Union law* <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32012R1215> (2020, July, 15).

[3] *Закон про міжнародне приватне право 2005*, ст.77 (Верховна Рада України). *Відомості Верховної Ради України, 32,* 422.

[4] *Цивільний процесуальний кодекс 2004,* ст.480 (Верховна Рада України). *Відомості Верховної Ради України*, *40-41*, 42.

the principal contract, or are governed by arbitration agreement or arbitral award in result of cession, or general public that may be automatically affected by award. Thus, disputes, arbitral awards in which may affect third parties are non-arbitrable in Japan. In Egypt, arbitration agreement may not be concluded by an agent, unless they act by virtue of written delegation. Contracts for commercial representation are non-arbitrable in Lebanon. Disputes from adhesion are non-arbitrable in Argentina as in such case the parties join the contract entirely and usually without conclusion of separate arbitration agreement.

Notion of non-signatories' involvement and fact of adhesion as ground for non-arbitrability may be justified by doctrine of *separability* or *autonomy* of arbitration agreement, according to which acceptance of contract in general does not mean acceptance of arbitration agreement. However, such approach transforms for pro-arbitrability, as non-signatories, in case of their consent, including by adhesion, are governed by contractual relations without limitation to dispute resolution.

Also, there is a view that disputes that may affect non-signatories, as patent, insolvency or intra-corporate, may be more effectively decided by national courts, rather than by arbitration that is inherently limited to involve persons other than contractual parties to an arbitration agreement[1]. Such problem may be solved by development of interaction between arbitration and state courts, including enabling arbitral tribunal to take an advantage of injunctive remedies and compulsory enforcement mechanism of state, instead of declaring the dispute non-arbitrable.

In its turn, the New York Convention does not prevent the third parties to be involved into a dispute. It is common that in principal-agent relations, the contract signed by the agent actually binds the principal that is at the roots of the theories of *implied consent*. Thus, persons not explicitly mentioned in the arbitration agreement made in writing may enter into its *ratione personae* scope that should not be considered as a circumstance that underpins non-arbitrability[2]. If non-signatory generally excepts or authorizes the signatory to except the contract that includes arbitration agreement and such non-signatory or its authorized representative has been informed about arbitration and was able to participate in it, there is no ground to consider such dispute as non-arbitrable. Considering influence of arbitral award on the general public, *erga omnes effect*, the third parties, who do not give consent on arbitration, are not bound by arbitral award. Thus, there is no need for exclusion of dispute, involving non-signatories from arbitrability.

In view of the foregoing, within arbitration-friendly climate the place for procedural arbitrability is designated by Article V(1) of the New York Convention that presumes that exclusively the opposing party may invoke such issues, rather than the court ex officio. That is justified by consequences that are brought by finding the dispute being non-arbitrable that genuinely is the severest ground for refusal in recognition and enforcement, considering that just the fact of presence of non-arbitrable matter makes the dispute incapable to be settled by arbitration without any analysis of possible effect of arbitral award.

Herewith, the arguments of procedural incapacity of arbitration are referred to in favour of non-arbitrability as a ground for refusal in recognition and enforcement, in particular, because of absence of evidence securing and compulsory enforcement mechanisms within arbitration. However, complete moving away from procedural non-arbitrability may be implemented by filling the gaps in legal regulation of arbitrability and by development of procedural mechanisms of interaction between arbitration and national courts.

4.2. Substantive Arbitrability

The most crucial matters of commercial, economic, social and political nature form the scope of substantive arbitrability. Hereinafter, it is suggested to define the matters of substantive arbitrability, considering possible consequences for international community and specific states, as well as to consider reasons for non-arbitrability under the criteria of security, social, economic and political influence.

4.2.1. Non-arbitrability of Security Matters

Non-arbitrability of security matters is the most obvious and rather disputable at the same time. Such matters include those that lie at the core of public safety and order as: *criminal offence* as in Botswana, Brunei, Costa Rica, England, Finland, Hong Kong, India, Kenya, Malaysia, Netherlands, Nigeria, Oman, Philippines, Portugal, Tanzania, Turkey and Zambia; *illegality* or *law violation* makes the matter non-arbitrable in

[1] Brekoulakis, S. L. (2009). On Arbitrability: Persisting Misconceptions and New Areas of Concern. In: Mistelis L., Brekoulakis S. (eds.). *Arbitrability: International & Comparative Perspectives.* Alphen aan den Rijn: Kluwer Law International, 44.

[2] ICCA (2011). *ICCA'S Guide to the Interpretation of the 1958 New York Convention: a Handbook for Judges* <https://www.arbitration-icca.org/media/0/13365477041670/judges_guide_english_composite_final_revised_may_2012.pdf> (2020, October, 04).

Indonesia, Nigeria, Sierra Leone and Singapore; *corruption* and *fraud* are non-arbitrable in India, Malaysia, Sierra Leone, Singapore and the US.

Herewith, non-arbitrability of security matters should not be perceived as a rule. For example, case law of Australia set that arbitrable disputes may involve claims for fraud, serious misconduct and certain statutory claims for breach of the competition, consumer and corporation acts[1].

Arbitrability of security disputes is inherently limited by effect of arbitral award on a certain scope of persons – parties of arbitration agreement and on a certain matter. Reference to criminal law as a national public law is ensured by the state enforcement mechanism and is not provided for arbitration.

Discussion on security matters arbitrability revolves around notion that in such case there are considered the grounds under which the dispute aroused as well as consequences of dispute's resolution for social security, instead of the matter of the dispute per se. However, disputes involving criminal offence should not be automatically excluded from capability of settlement by arbitration, as arbitral tribunal is empowered to properly react on illegality, including to resolve civil and commercial aspects of the dispute, to declare a deal associated with offence as void, to reject in claim that violates the law. Furthermore, arbitral tribunals generally reject to consider the claim, if they have no power to rule on the dispute according to *kompetenz-kompetenz* doctrine providing by Article 16 (1) of the UNCITRAL Model Law. If arbitral tribunal fails to properly react on security matters and recognition or enforcement of arbitral award may result in gross violation of justice, then national courts, acting ex officio, may refuse in recognition and enforcement under the ground of public policy violation.

4.2.2. Non-arbitrability of Social Matters

Social reasons quite frequently explain disputes' non-arbitrability, for example, non-arbitrability of *social security* issues as in Austria and related to *maintenance obligations* as in Bulgaria, Mexico and Poland. Likewise, disputes about *civil status* and *capacity* are recognized as non-arbitrable in Argentina, Botswana, Brunei, Bulgaria, Czech Republic, France, Italy, Lebanon, Luxemburg, Mexico and Philippines. *Non-negotiable personal rights* such as on physical integrity, human dignity, privacy, right on food, except for monetary compensation, are defined as non-arbitrable in Lebanon.

Family disputes, considering their importance for social and cultural heritage, in particular for traditional societies, are non-arbitrable in majority of states including Argentina, Armenia, Austria, Brunei, Costa Rica, Denmark, Finland, Germany, Italy, Lebanon, Liechtenstein, Malaysia, Netherlands, Sweden and Turkey. Herewith, in some jurisdictions only particular issues of family relations are defined as non-arbitrable such as: *marital disputes* in Botswana, China, India, Macedonia and Zambia; *divorce* or *separation* in Bulgaria, France, Hong Kong, Japan, Luxemburg, Mexico, Nigeria, Philippines, Tanzania and Vietnam; disputes related to *parental rights* and *adoption* in China, India, Macedonia, Portugal, Ukraine and Zambia; *maintenance*, including *alimony obligations*, in Bulgaria and Mexico; *inheritance relations* in China and Ukraine[2].

Herewith, it seems to be rather justified to exclude contractual, or at least property disputes from non-arbitrability scope in respect to the parties' right to agree on alternative dispute resolution method, when they are in full capacity to do so. For instance, issues of matrimonial assets division are excluded from the scope of family disputes non-arbitrability in Lebanon and Mexico. Thus, spouses bound by marriage contract or at the stage of legal separation shall be free to define the method of dispute resolution, including arbitration. Another example is arbitrability of estimated hereditary rights as in Lebanon.

Limitations of family disputes arbitrability in part of relations that technically may be a subject to agreement are driven by culture, traditions and family members' status that being in full capacity for secular jurisdictions, are not the same for traditional one. Such traditionally 'incapable' persons at local level may be recognized as vulnerable and needed to be protected that is guaranteed through the state judicial system. However, such approach is not justified at international or transnational levels. Pro-arbitration approach provides for no obstacles for family disputes arbitrability as far as they are contractual and parties, being in full capacity, whereas disputes that involve any third parties, furthermore, minors or incapable persons, shall be automatically overleapt.

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[1] Jones, D., Bannon, F., Brackin, D. and others (2020). Australia. *Asia Pacific Arbitration Review 2020. GAR* <https://globalarbitrationreview.com/benchmarking/the-asia-pacific-arbitration-review-2020/1193375/australia> (2020, June 20).

[2] *Закон про міжнародне приватне право 2005*, ст. 77 (Верховна Рада України). *Відомості Верховної Ради України, 32*, 422.

Consumer disputes are defined as non-arbitrable in Argentina, Armenia, Belgium, Bulgaria, Czech Republic, Denmark, India, Ireland and Spain. Consumer is usually recognized as vulnerable party that in practice is deprived of choosing the terms of the contract. Consumer, being interested in a product, may be not qualified to evaluate contractual terms, but is forced to accept the terms proposed by the seller. At the same time consumer relations have wide public character. All of that gives rise to special legal regulation of consumer disputes.

The EU has defined the consumer protection as a part of its public policy and obliged national courts to declare the arbitration agreement in consumer dispute void and annul it ex officio according to the decisions of the European Court in *Asturcom v. Nogueira*[1] and *Mostaza v. Centro*[2]. Thus, it seems that consumer disputes as a part of public policy cannot be a subject of arbitration agreement that underpins their non-arbitrability. Such approach is connected with equation of non-arbitrability and public policy that is quite controversial. Herewith, should be noted gradual acceptance of alternative consumer disputes resolution mechanisms that is reflected in launching the European Online Dispute Resolution platform[3].

National laws differently regulate consumer disputes arbitrability. In Estonia, they are non-arbitrable only within credit relations. In Armenia and Slovenia, arbitration agreement in consumer dispute is valid, if it is executed after the dispute has arisen. In India and Ireland consumer disputes may be brought to arbitral tribunal only by consumer that prevents them to be offended. England and Ireland define that consumer dispute is arbitrable, if the amount in dispute is over 5000 Euro and arbitration agreement is mutually agreed by the parties that prevents the arbitration to be overpriced for the consumer[4].

Next one are *labour disputes* being non-arbitrable in Andorra, Austria, Bulgaria, China, Costa Rica, England, Germany, Japan, Lebanon, Lithuania, Peru, Philippines, Switzerland and Vietnam. In Estonia labour disputes are non-arbitrable in part of *termination of employment contract* and in Liechtenstein – if they are related to *apprenticeship*. Issues related to employees' payments arising from labour contracts are not eligible for arbitration in Turkey. In Belgium and Slovenia, there is a restriction that arbitration agreement may be executed only after the dispute has arisen. Should be noted that disputes related to employment relations, but being not a part of them, may be found arbitrable in Vietnam, for example, non-disclosure, if it is separated from the employment contract. In Slovenia arbitration agreement with employee should be concluded in a special document, separate from the principal contract, hand-signed by the parties, with the seat of arbitration in Slovenia, unless the parties expressly agreed otherwise[5].

As non-arbitrable under social reasons may be defined *insurance disputes* as in Australia and Belgium, unless arbitration agreement has been concluded after the dispute has arisen. Such approach is based on probability of insured person to be in vulnerable position at the occurrence of an insured accident.

Insolvency disputes may be defined as non-arbitrable, considering registration formalities if any, as well as economic interest of the state. However, dominant influence is exerted by social reasons, relating to the vulnerable position of the debtor. Thus, disputes related to insolvency are defined as non-arbitrable in Australia, Bermuda, Costa Rica, India, Japan, Lebanon, Lithuania, Malaysia, Netherlands, Macedonia, Russia, Singapore and Ukraine.

Herewith, this matter is also a subject to a number of non-arbitrability discussions. The Court of Appeal of Lithuania in *Shipping Services v. Sevnaučflot, Fishery Group* held that a dispute between two companies was not capable of settlement by arbitration because legal status of their relationship had changed after one company had entered into insolvency.[6] In Ukraine property aspects within bankruptcy

[1] *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira, Case C-40/08, I-09579, 2009* (European Court, 1st Chamber). *European Union law* <https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX%3A62008CJ0040> (2020, October, 03).

[2] *Mostaza Claro v. Centro Móvil Milenium SL, Case C-168/05, I-10421* (European Court, 1st Chamber). < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62005CJ0168> (2020, October, 03).

[3] European Commission (2020). *Alternative Dispute Resolution for Consumers* <https://ec.europa.eu/info/live-work-travel-eu/consumers/resolve-your-consumer-complaint/alternative-dispute-resolution-consumers_en> (2020, October, 03).

[4] ICLG (2019). *International Arbitration Laws and Regulations* <https://iclg.com/practice-areas/international-arbitration-laws-and-regulations> (2020, August, 25).

[5] Menard, M., Ulčar, M. (2019). Slovenia. *European Arbitration Review. GAR* <https://globalarbitrationreview.com/benchmarking/the-european-arbitration-review-2019/1175879/slovenia> (2020, October, 03).

[6] UNCITRAL (2016). *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*

proceeding are considered to be excluded from non-arbitrability at legislative level, the correspondent bill currently is reviewed.[1] Separate problematic issue, frequently addressed in international commercial arbitration, is situation, where the debtor is a party to arbitration agreement and insolvency proceedings has been initiated after commencement of arbitration. Following pro-arbitration approach, initiating of insolvency should not prevent from arbitration. However, international legal regulation to this issue need further development.

Considering abovementioned, limitations of social dispute's arbitrability may be related to the following factors: (1) one of the parties is a physical person that is under a risk of lack of capacity; (2) inequity of contractual parties by the status and determination of unfair conditions for the vulnerable party, including force to arbitrate; (3) insignificance of the dispute through the global perception and risk of arbitration to be overpriced; (4) traditional dominance of state influence on certain social relations, including, family. Such arbitrability limitations form a mechanism for vulnerable party protection. From this point, such limitations seem to be rather justified. By contrast, downside of defining scope of non-arbitrability under social reasons is overprotection resulting just in impeding access to alternative dispute resolution. Arbitration should not be associated with lack of justice. Potential discrepancies of arbitration that make disputes non-arbitrable may be fixed by adoption of relevant procedural mechanisms, for example, comprehensive techniques for control of arbitral expenses of the weaker party. Herewith, the risk of forced conclusion of any agreement, without exception for arbitration one, generally is recognized as violation of law and subject to prevention of unfair competition and monopoly abuse. Thus, in case vulnerable party participate in transnational consumer relations, they should be free to choose method of dispute resolution.

4.2.3. Non-arbitrability of Matters of Economic Interest

Private contractual relations generally benefit from guaranteed confidentiality and state non-interference. However, it makes a great difference when the matter is of state economic interests. Thus, some subjects may be excluded from capability to be in private ownership, or some subjects in private ownership may be under mandatory state control because of their public necessity. This is related to define such matters as non-arbitrable because of their economic interest for international society or state, as well as for general public. Thus, the matter of compensation for *environmental harm* is defined as non-arbitrable in Brazil and Russia that it thought to be underpinned by national as well as international economic interests. Considering local economic interests, it seems that non-arbitrability has been set up for such matters as: *real estate* in the EU[2] and at national level in Bulgaria, Egypt, Kosovo, Macedonia, Turkey, Vietnam and Ukraine; *residential, vocational* and *lease relations* in Estonia; *concession* in Mexico; *agricultural relations* in China and Mexico; *property* and *usage rights on vessels* in Macedonia; *flying objects*, as aircrafts, registered in Kosovo and Hong Kong; *issuance* and *cremation of securities* in Ukraine (arbitration community in Ukraine has claimed for arbitrability of such disputes under condition that depository or investment fund are parties of the arbitration agreement)[3].

However, should not be missed pro-arbitrability exceptions from the mentioned rules. For example, despite general non-arbitrability of disputes related to real estate in Ukraine, the court in *Dorianix* (2019) recognized and permitted enforcement of ad hoc arbitral award by which the title of ownership of immovable property situated in Ukraine has been declared to be hold by the claimant[4]. Previously the Ukrainian court rejected in similar Case of *Jewelsoft* (2017), recognising the matter as non-arbitrable[5]. Another exception adopted by laws of Ukraine in 2015 is arbitrability of disputes related to immovable

<https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf> (2020, July, 15).

[1] UAA (2020). *Working Group I – On Improving of Ukrainian Arbitration Legislation in the Field of International Arbitration and arbitral proceedings* <http://arbitration.kiev.ua/en-US/Arbitration-Association/Working-Groups.aspx?ID=42> (2020, July, 15).

[2] *Regulation (EU) No.1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012,* art. 24 (European Parliament and Council). *European Union law* <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32012R1215> (2020, July, 15).

[3] UAA (2020). *Working Group I – On Improving of Ukrainian Arbitration Legislation in the Field of International Arbitration and arbitral proceedings* <http://arbitration.kiev.ua/en-US/Arbitration-Association/Working-Groups.aspx?ID=42> (2020, July, 15).

[4] *Ухвала по справі №457/927/18, 2019* (Київський апеляційний суд України). *Реєстр судових рішень України* <http://reyestr.court.gov.ua/Review/80201521> (2020, July, 15).

[5] *Ухвала по справі №522/14695/14-ц, 2017* (Апеляційний суд Одеської області України). *Реєстр судових рішень України* <http://reyestr.court.gov.ua/Review/65828256> (2020, July, 15).

property subject to joint-venture agreements, except for appearance, termination and registration of the right on such immovable property[1].

Generally *intellectual property* disputes are defined non-arbitrable because of national economic reasons as in Australia, Italy, Japan, Netherlands, Russia and Ukraine. In the EU the disputes on registration or validity of patents, trade-marks, designs are generally under exclusive jurisdiction of the Member States' courts[2]. Belgium national court directly defines that disputes from the Act on Patents related to mandatory licences are excluded from arbitration[3].

Noteworthy are *competition* and *anti-trust disputes* that are defined as non-arbitrable in Australia, Brazil, England, Hong Kong and Ukraine. The EU defined the competition disputes as a part of its public policy that is stipulated in *Eco Swiss v. Benetton*[4]. Herewith, in some jurisdictions private-law aspects of competition still may be arbitrable as in Sweden[5].

Should be noted the popular ruling of the US Supreme Court in *Mitsubishi v. Soler* that became a prominent one in international arbitration practice as the national court set that antitrust claims should be recognized arbitrable concerning sensitivity to the need of international commercial system for predictability in the resolution of disputes, while national court would have opportunity at enforcement stage to ensure that legitimate interest in the antitrust issues had been addressed by arbitral award[6]. The approach of the US Supreme Court has been followed by many national jurisdictions and not exclusively in relation to antitrust disputes. Such approach suggested to explore whether arbitration procedure was due and consequences of arbitral award execution, instead of matter of the dispute on the merits. Thus, issue of formalization of arbitration procedure has been invoked as a key to arbitral award enforceability. Should be mentioned that the process of such formalization has been called by the term '*americanization of arbitration*' that was introduced in the mid-1980s, allegedly by Stephen Bond, then Secretary General of the ICC[7]. This process evidences an increasing tendency for arbitration to adopt the formalism and technicalities of national judicial process[8].

A range of discussions are around *corporate disputes* arbitrability that remain controversial in England, Belarus, Japan, Korea, Liechtenstein, Netherlands, Macedonia, Peru, Poland, Portugal, Russia, Serbia, Singapore, Slovenia, Turkey and Ukraine. Challenges in submission corporate disputes to arbitration may lie on planes of public policy, social protection of minority shareholders or state registration. In the EU, a number of corporate matters, including nullity or dissolution of companies, validity of decisions of their bodies, validity of entries in registers are generally recognized as non-arbitrable[9]. At local level, for example, court of Spain found that actions aimed at challenging corporate resolutions contrary to public order are excluded from arbitrability, unlike actions, which are merely contrary to the law, the company bylaws or corporate

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[1] *Закон про міжнародне приватне право 2005,* ст.77 (Верховна Рада України). *Відомості Верховної Ради України, 32,* 422.

[2] *Regulation (EU) No.1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012,* art. 24 (European Parliament and Council). *European Union law* <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32012R1215> (2020, July, 15).

[3] Billiet, J. (2019). Belgium. *European Arbitration Review 2019. GAR* <https://globalarbitrationreview.com/benchmarking/the-european-arbitration-review-2019/1175821/belgium> (2020, October, 03).

[4] *Eco Swiss China Time Ltd v. Benetton International NV, Case C-126/97, 1999 (*European Court). *European Union law* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61997CJ0126> (2020, July, 15).

[5] *Swedish Arbitration Act, 1999,* s. 1(3) 9 SFS, 116 (Riksdag of Sweden). *JURIS Arbitration Law* <https://arbitrationlaw.com/library/swedish-arbitration-act-1999-original-swedish-text-and-english-translation-sar-1999-1> (2020, July, 15).

[6] *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth Case 3-1569, 1985,* 473 U.S. 614, (U.S. Supreme Court). *Newyorkconvention1958* <https://newyorkconvention1958.org/index.php?lvl=notice_display&id=513> (2020, July, 15).

[7] Helmer, E. V. (2003). International Commercial Arbitration: Americanized, "Civilized," or Harmonized? *Ohio State Journal on Dispute Resolution, 19, 1,* 35-68.

[8] Lalive, P. (1995). The Internationalisation of International Arbitration: Some Observations. In M. Hunter, A. Marriott, V.V. Veeder (eds.) *The Internationalisation of International Arbitration: the LCIA Centenary Conference.* London; Boston: Graham & Trotman/Martinus Nijhoff, 49-58.

[9] *Regulation (EU) No.1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012,* art. 24 (European Parliament and Council). *European Union law* <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32012R1215> (2020, July, 15).

interests[1]. The Supreme Court of Netherlands ruled that arbitrators have no jurisdiction to review the validity of shareholders' resolution whereby a director is appointed or dismissed, basing on its *erga omnes* effect related to all shareholders, including non-signatories[2].

Some jurisdictions provided for certain reservations for arbitrability of disputes that involved *minority shareholders*. In Austria, corporate disputes in which minority shareholders are involved are considered as consumer disputes and, in such case, arbitration clause, incorporated in the charter, is invalid[3]. Germany has gradually accepted arbitrability of corporate disputes, in particular in light of minority shareholders' protection starting from non-arbitrability in 1996 towards standards for arbitrability adopted in 2009 as: (1) all shareholders should consent to arbitration through an arbitration clause in the charter or by separate agreement, (2) all stakeholders must be notified about arbitration and be granted an opportunity to participate in constitution of tribunal and proceedings, (3) all disputes regarding a specific shareholder resolution must be concentrated in one arbitration to exclude conflicting decisions[4]. In order to mitigate risks of unenforceable arbitration agreements, the German arbitration Institute has developed a model arbitration clause and Supplementary Rules for Corporate Law Disputes[5].

Generally, even though under different reasons, it has become common at legislative level to allow arbitrability of corporate disputes under the condition that arbitration agreement is signed by all shareholders or is incorporated into the charter like in Slovenia, Poland, Singapore and Ukraine. In Poland, it has been expressly clarified that such a clause shall cover disputes based on the corporate relationship not only between shareholders and the company, but also between company's governing bodies and their individual members[6].

In some jurisdictions arbitrability of corporate disputes is more restricted. Russian arbitration reform of 2015 made most corporate disputes arbitrable, provided that: (1) the arbitration is administered by permanent arbitration institutions registered in Russia – as for 2020 there are five Russian institutions and two foreign, Vienna and Hong Kong International Arbitration Centres, (2) all shareholders and the company itself are parties of arbitration agreement, (3) arbitration is administered under rules that require to publish information about the dispute on institution's website. The last two requirements were abolished in March 2019. Herewith, the disputes on convocation of shareholders' meetings, out of notarization of transactions in respect of participation interests in Russian LLC and on expulsion of shareholders from legal entities still remain non-arbitrable[7].

In Ukraine, the list of non-arbitrable matters, within exclusive jurisdiction of national courts, established in 2005, had not included corporate disputes, except for incorporation and liquidation of legal entities[8]. However, in 2008 the Supreme Court of Ukraine ruled that corporate disputes, in particular, disputes between shareholders related to formation of management bodies and decision making by them, are non-arbitrable as they were regulated by mandatory laws, non-compliance with which violated public policy[9]. In

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[1] Romero, M., Tarjuelo, J. (2019). Spain. *European Arbitration Review. GAR* <https://globalarbitrationreview.com/benchmarking/the-european-arbitration-review-2019/1175880/spain> (2020, October, 03).

[2] Van Otterloo, H. D. M. (2015). Arbitration and Company Law in the Netherlands. *European Company Law*, *12, 3,* 160-165.

[3] Konrad, C. W., Peters, P. A. (2020). Austria. *European Arbitration Review. GAR* <https://globalarbitrationreview.com/benchmarking/the-european-arbitration-review-2020/1209791/austria> (2020, October, 03).

[4] Hertel, T., Covi, A. (2018). Arbitrability of Shareholder Disputes in Germany. *Kluwer Arbitration Blog* <http://arbitrationblog.kluwerarbitration.com/2018/02/07/arbitrability-shareholder-disputes-germany/> (2020, October, 03).

[5] DIS (2009). *DIS-Supplementary Rules for Corporate Law Disputes* <http://www.disarb.org/en/16/rules/dis-supplementary-rules-for-corporate-law-disputes-09-srcold-id15> (2020, October, 03).

[6] Gessel-Kalinowska vel Kalisz, B., Jodłowska, N., Kisielińska-Garncarek, J., Czech, K. (2020). Poland. *European Arbitration Review. GAR* <https://globalarbitrationreview.com/benchmarking/the-european-arbitration-review-2020/1209802/poland> (2020, October, 03).

[7] Vaneev, A., Mednikov, D., Kuzmin, M. (2020). Russia. *European Arbitration Review. GAR* <https://globalarbitrationreview.com/benchmarking/the-european-arbitration-review-2020/1209804/russia> (2020, October, 03).

[8] *Закон про міжнародне приватне право 2005*, ст.77 (Верховна Рада України). *Відомості Верховної Ради України*, *32*, 422.

[9] *Постанова про практику розгляду судами корпоративних спорів, №13, 2008* (Пленум Верховного Суду України). *Вісник Верховного суду України*, *11*.

2009 non-arbitrability of corporate disputes within business entity had been adopted[1]. Since then, the approach to corporate disputes arbitrability in Ukraine had been frequently changed: in 2011 restrictions formally limited to inadmissibility of corporate disputes to be referred to domestic arbitration; in 2013 the matter of shares' sale and purchase being not corporate was defined by courts as arbitrable; in 2014 legislative restrictions were extended to all legal entities, instead of business one; in 2017 restrictions were extended to the disputes related to rights and duties of shareholders. Notwithstanding, case of *BTA Bank v. Company Metryka* of 2016 provided an example of recognition and enforcement of arbitral award on recognition of ownership of pledged shares[2]. At the end of 2017 in course of comprehensive procedural reform corporate disputes has fallen under exclusive jurisdiction of Ukrainian courts, unless an arbitration agreement is concluded between the company and all shareholders[3].

Thus, corporate disputes arbitrability is a universal example of gradual recognition of arbitrability and step-by-step legislative facilitation. This process, may be considered as a late result of transition to market economy with a larger share of private commerce, as well as gradual implementation of pro-arbitrability approach guided by transnationalization of corporate relations. Transnational companies, incorporated and, thus, being governed by specific national law, require at least within its corporate relations to enjoy transnational regulation with capacity to refer to alternative disputes resolution methods. Herewith, special attention to corporate disputes arbitrability is explained by aggregation of the most controversial issues within them, such as social protection and public policy, or when company's economic activity is in sight of the state.

There is no doubt that private civil and commercial relations are capable to be settled by arbitration, despite of their probable erga omnes effect on the economic interests. Herewith, non-arbitrability exceptions underpinned by economic interests are established at the edge of national policy, international policy with its principle of reciprocity and transnational pro-arbitration approach. While non-arbitrability of certain matters as aircrafts or ships are taken for granted, the matters common in all jurisdictions as corporate or intellectual property seek for balanced regulation that underpins formation of adaptive legislation. The examples of defining non-arbitrable matters of economic character to full extent demonstrate state, arbitration and transnational corporations competing by powers.

4.2.4. Non-arbitrability of Matters of Political Interest

Political interest influences a lot on investment arbitration, however, it also effects on private civil and commercial arbitration. National policy cannot stand alone, it is integrated with economy, security and social relations. Despite that matters of political interest more often are included in public policy ground for refusal in recognition and enforcement, it is still worth to refer to prompt analysis of them in course of examination of the ground of non-arbitrability, considering the delicate line between non-arbitrability and violation of public policy grounds for refusal. Thus, some matters may be defined as non-arbitrable genuinely because of political influence, that much reflects in non-arbitrability under sanction legislation.

For example, arbitral awards related to the matters of military industry or matters of strategic importance for state economy and security in favor of a legal entity, incorporated in aggressor state or owned by aggressor state, in particular, Russia, cannot be recognized and enforced in Ukraine, thus such matters are not capable of settlement by arbitration[4]. Herewith, noteworthy are the recent resolutions of the Supreme of court of Ukraine. In case *Normetimpeks v Zaporozhtransformator* the court found that economic sanctions and other restrictive measures are of temporal nature as they are established for a specific term, thus, they do not release the debtor from an obligation. The court explained that by legal nature it is a suspension of execution of obligation[5]. In this context the mentioned court's considerations come to find violation of Ukrainian sanctions legislation as violation of national public policy, instead of non-arbitrability ground.

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[1]. *Господарський процесуальний кодекс, 1992,* ст.22 (Верховна Рада України). *Відомості Верховної Ради України*, *6*, 56.

[2] *Ухвала по справі №761/8395/16-ц, 2016* (Шевченківський районний суд м. Києва. України). *Реєстр судових рішень України* <http://reyestr.court.gov.ua/Review/60150657> (2020, October, 03).

[3] *Господарський процесуальний кодекс 1992,* ст.22. (Верховна Рада України) *Відомості Верховної Ради України, 6*, 56.

[4] *Закон про міжнародне приватне право 2005*, ч.2 ст.81 (Верховна Рада України). *Відомості Верховної Ради України, 32*, 422.

[5] *Постанова по справі №824/146/19, 2020* (Верховний суд України). *Реєстр судових рішень України* <http://reyestr.court.gov.ua/Review/88749651> (2020, October, 03).

In case *Avia Fed Service v Artem* the court compared refusal in recognition and enforcement of arbitral award under sanctions legislation with artificial regulatory barrier that blocking arbitral award and found it as absolutely unacceptable from the point of view of international law. The court stated that refusal to recognize and enforce an arbitral award on the territory of Ukraine may violate the guarantees provided for in part 1 of Article 1 of Protocol No.1 to the Convention for the Protection of Human Rights and Fundamental Freedoms .[1]

Herewith, should be noted the arbitration reform in Russia of June 2020 under which any dispute that involves a party, including foreign, that is somehow may be affected by sanctions or restrictions against Russia are under exclusive competence of Russian national courts, if such party claims about that[2]. Thus, non-arbitrability of the matters under a reason of parties' status forms a part of subjective non-arbitrability. Should be noted, that the reform is widely condemned in Russia as it violates the provisions of the New York Convention[3].

Thus, definition of non-arbitrability of matters of political interest are extremely controversial considering high level of state involvement that makes legal regulations to change in order to protect national interests.

5. CONCLUSIONS

Non-arbitrability doctrine has been gradually transformed, adopting to volatile social, economic and political environment. There is no international standard defining the scope of non-arbitrability that makes this issue to be addressed exclusively by national jurisdictions. Herewith, the approaches to define non-arbitrable matters may be of national, international and transnational nature that influence on reasons and mechanisms to define them.

Arbitrable and non-arbitrable matters are defined by: the type as objective and subjective; manner of legal regulation as positive and negative; legal nature as procedural and substantive. All together this has formed a comprehensive mechanism for non-arbitrability scope regulation.

Objective matters of non-arbitrability are defined by their nature, while subjective matters depend on parties' capability to submit the dispute to arbitration. The main distinction between them lies in consequences of application, as involvement of objective non-arbitrable matters is a ground for refusal in recognition and enforcement of the arbitral award by the court ex officio, unlike subjective non-arbitrable matters.

Under positive approach the matters are defined in a generalized sense, usually setting the frames of arbitrability and scope of its application as: in commercial, economic, financial and monetary relations; in proprietary relations; in contractual relations or when subject matter may be alienated. Under negative approach there are defined non-arbitrable exceptions from matters that under positive approach are arbitrable.

Matters of procedural arbitrability are defined from: the form of arbitration agreement, arbitral award or foreseen form of recognition and enforcement. Thus, matters of procedural non-arbitrability under positive approach include: disputes consequences of which may be independently regulated by the parties; not under exclusive jurisdiction of state court; that may be settled by ordinary court. Matters of procedural non-arbitrability under negative approach include disputes related to: administrative and enforcement procedures; state registration; *erga omnes* effect; non-signatories.

Conversely, procedural arbitrability, as well as subjective, without any substantive analysis, have concentrated just on formalities and documentation. Moving away from procedural and subjective non-arbitrability as a ground for refusal in recognition and enforcement of arbitral award may be reached by extension of arbitration resources that is integral component of the process towards pro-arbitrability. Procedural deficiencies of arbitration may be remediated by improvement of mechanisms of legal assistance and interaction between arbitration and national courts.

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[1] *Постанова по справі №761/46285/16-ц, 2020* (Верховний суд України). *Реєстр судових рішень України* <http://reyestr.court.gov.ua/Review/86903591> (2020, October, 03).

[2] *Закон о внесении изменений в Арбитражный процессуальный кодекс Российской Федерации в целях защиты прав физических и юридических лиц в связи с мерами ограничительного характера, введенными иностранным государством, государственным объединением и (или) союзом и (или) государственным (межгосударственным) учреждением иностранного государства или государственного объединения и (или) союза №171-ФЗ, 2020* (Государственная Дума Российской Федерации). *КонсультантПлюс* <http://www.consultant.ru/document/cons_doc_LAW_354472/> (2020, October, 03).

[3] Моисеенко, К. (2020). Комментарий к закону о переносе в Россию споров с участием лиц, попавших под санкции. *Zakon Ru*. <https://zakon.ru/blog/2020/6/26/kommentarij_k_zakonu_o_perenose_v_rossiyu_sporov_s_uchastiem_lic_popavshih_pod_sankcii> (2020, October, 03).

Matters of substantive arbitrability are defined in relation to subject matter of the dispute considering economic, social, political values. Such matters are defined at national level that results in formation of unique jurisdictional practices. Discussion on defining and unifying non-arbitrable exceptions at international level sees no way out considering that primarily reason to refer to non-arbitrability is protection of state sovereignty.

Should be noted the tendency to extension of the scope of arbitrable matters valuable for society and state that had been non-arbitrable before, by enabling to conclude arbitration agreement after the dispute has arisen or establishment monetary eligibility related to the amount in dispute that may be referred to arbitration. Herewith, the practice of selection of arbitrable aspects of proprietary or commercial character from non-commercial or non-contractual relations that are genuinely non-arbitrable should be taken of being arbitration-friendly. Such additional conditions form a transitional phase from non-arbitrability to arbitrability.

Considering the abovementioned, selection of private interests, intentions of national jurisdictions to loyalty to private sector and pro-arbitrability underpin transnationalization of mechanisms for defining arbitrability.

Remote prospects of non-arbitrability doctrine development, throwing away their illusoriness, include application just of the transnational approach to define non-arbitrability, limiting to matters that are objective by the type, negative by the manner of legal regulation and substantive by legal nature. The present collisions in legal regulation of defining non-arbitrable matters may be settled by the following: (1) arbitrability scope should be extended to all contractual relations, regardless they are commercial or not; (2) recognition and enforcement of arbitral award in case the matter is non-arbitrable should be refused only if the opposing party claims for that; (3) recognition and enforcement of arbitral award by the national court ex officio should be refused only under a public policy ground.

In practice, national, international and transnational approaches to define non-arbitrable matters are applied in conjunction. Correlation between them indicates the balance between pro-arbitrability, investment attraction policy and protection of national sovereignty in the state. Thus, visible prospects include development of agile and flexible mechanisms to define non-arbitrable matters, along with development of interaction between arbitral tribunals and courts, empowering tribunals to properly react on law violations, filling the gaps in legal regulation.

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