Under the auspices of:
National Assembly of the Republic of Serbia

With the support of:
The National Academy for Public Administration

Law on General Administrative Procedure: Contemporary Tendencies and Challenges

Thematic Collection

Belgrade, 2024

Law on General Administrative Procedure:
Contemporary Tendencies and Challenges
Thematic Collection

Printing:
Eurosfera & Partners, Belgrade

Printing:
100

Publishers:
Eurosfera & Partners, Belgrade
The Institute of Comparative Law, Belgrade
MLC Faculty of Management and Law Ljubljana

On behalf of publishers:
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Publishing a publication helped by:
Eurosfera & Partners, Belgrade;
The Institute of Comparative Law, Belgrade; MB University, Belgrade

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web: www.eurosfera.org

Покровитељ:
Народна скупштина Републике Србије

Уз подршку:
Националне академије за јавну управу

Закон о општем управном поступку: Савремене тенденције и изазови

Тематски зборник

Београд, 2024

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Издавачи:
Eurosfera & Partners, Београд
Институт за упоредно право, Београд
MLC Fakulteta za management in pravo Ljubljana

За издаваче:
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Објављивање публикације помогли су:
Eurosfera & Partners, Београд;
Институт за упоредно право, Београд; МБ Универзитет, Београд

Адреса редакције:
Eurosfera & Partners, 11090 Београд, Суседградска 4-Б
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IS THERE A PLACE FOR ARBITRATION IN DISPUTES ARISING FROM ADMINISTRATIVE CONTRACTS**

Abstract

The paper seeks to analyse arbitrability of disputes in administrative contracts with special reference to disputes arising from the contracts on public-private partnership, concessions and public procurements. The first part of the paper aims to define general notion of arbitrability, the focus being on determining the subjective and objective arbitrability of disputes. The second part of the paper deals with the issue of admissibility of arbitration as a means of settling disputes in administrative contracts. Based on an interpretation of normative solutions and arbitration and court practice, a proposal is made to recognise arbitrability in this type of disputes as well.

Keywords: Administrative Contract, Arbitration, Subjective Arbitrability, Objective Arbitrability.

1. Instead of an Introduction

As means of amicable dispute resolution, arbitration relied on the confidence of the parties to a dispute that a third chosen party to whom they are submitting the dispute in hand would resolve such dispute in a satisfactory manner. Since the time of ancient Rome, it has been recognised that a person entrusted by the parties to resolve a dispute can give a final judgement based on merits. Modern arbitration, as it is known today, took its shape in the 18th and early 19th centuries.[1] Other than on expertise, trust in arbitration is based on moral integrity of the chosen person. In this sense, trust and confidence characterize arbitration. However, even though the parties may be willing to resolve all disputes in this way, not all disputes are capable of arbitration and not all disputes may be subjected to arbitration. Hence, the right to submit jurisdiction to a chosen person is not absolute. To the contrary, it is limited by a decision of a State to

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** This paper is a result of the research conducted at the Institute of Comparative Law financed by the Ministry of Science, Technological Development and Innovation of the Republic of Serbia under the Contract on realization and financing of scientific research of SRO in 2024 registered under no. 451-03-66/2024-03/200049.

[1] For more on historical development of dispute resolution by arbitration see: Jelena Vukadinović Marković, *Postupak rešavanja sporova pred međunarodnim trgovinskim arbitražama*, Beograd, 2022, pp. 19-22.

reserve adjudication of certain kinds of disputes to national courts by prescribing overriding mandatory provisions, public policy rules or exclusive jurisdiction of national courts for certain kinds of disputes. In this way, States define the scope of arbitrability of disputes, which reflects the extent to which States accept arbitration as an alternative dispute resolution method. Generally speaking, the States recognise arbitrability in disputes arising from private relationships, but not in those arising from public relationships. Thus, disputes of commercial nature are deemed to be arbitrable, while disputes in criminal law or family law are traditionally considered to be non-arbitrable. There is, however, a large number of relationships between these two groups that belong to the so-called grey area in arbitration. These include disputes in competition law[2], intellectual property law[3], and disputes arising from administrative contracts.

2. Notion of Arbitrability

The arbitrability of disputes means the capability or admissibility of disputes to be settled by arbitration. It is determined by positive regulations and is a condition precedent for the validity of an arbitration agreement.[4] However, arbitrability is neither uniquely determined, nor forever defined. The recognition of arbitrability depends both on the inherent nature of the disputed relationship, and on the solutions available in the positive legal regulations of the State of the seat of arbitration and the State of execution of the arbitral award. Therefore, one cannot speak of a single and universal notion of arbitrability. In addition, the meaning of arbitrability often changes with time. There are different interpretations at different periods of time even in the same State or court. Thus, arbitrability is a mystery, like a woman wearing a veil.[5]

The capability of a dispute to be settled by arbitration is manifested in two forms: as subjective (*ratio personae*) and as objective arbitrability (*ratio materiae*).[6] Commentators approaching this issue from the point of view of procedural law theory also distinguish jurisdictional arbitrability, whereby they mean that a national court does not hold exclusive jurisdiction over a specific dispute.[7] For the purpose of this paper we shall concentrate on the objective and subjective

[2] See Jelena Vukadinović, *Uloga arbitrabilnosti u procesu rešavanja sporova pred međunarodnom trgovinskom arbitražom*, doktorska disertacija, Univerzitet u Beogradu Pravni fakultet, Beograd, 2016, pp. 213-235.

[3] Jelena Vukadinović, "Arbitraža i/ili medijacija kao način rešavanja sporova iz prava intelektualne svojine", *Pravna riječ*, No. 52, 2017, pp. 133-145.

[4] For more on notion of arbitrability in terms of effect of an arbitration agreement see. J. Vukadinović (2016), pp. 106-108; Maja Stanivuković, *Međunarodna arbitraža*, Službeni glasnik, Beograd, 2013, pp. 101-102.

[5] Lin Ching-Lang, *Arbitration in administrative contracts: comparative law perspective*, Institut dȇtudes politiques de paris - Sciences Po, Paris, 2014, p. 15.

[6] Distinction between subjective and objective arbitrability is championed by Philippe Fouchard, Berthold Goldman, *Fouchard, Gaillard, Goladman on International Commercial Arbitration,* Kluwer Law International, 1999, p. 312; Jelena Perović, *Ugovor o međunarodnoj trgovinskoj arbitraži*, Službeni list SRJ, Beograd, 2002, 107 ff.

[7] Gordana Stanković., Borivoje Starović., Ranko Keča, Nevena Petrušić, *Arbitražno procesno pravo*, Udruženje za građansko procesno i arbitražno pravo, Niš, 2002, p. 102-103.

concept of arbitrability, bearing in mind that the domestic Law on Arbitration [8] defines objective arbitrability by introducing a qualification relating to the exclusive jurisdiction of national courts.

As already mentioned, disputes arising from international business contracts are traditionally deemed to be arbitrable. Such disputes are of a commercial legal nature, arising between persons of private law. Disputes arising between a State on the one hand and persons of private law on the other, belong to the so-called grey area of arbitrability. Whether or not such disputes will be deemed to be arbitrable will depend on the nature of the disputed relationship. In other words, whether disputes in the grey zone of arbitrability may be settled by arbitration depends on the interpretation of the fulfilment of the conditions for subjective and objective arbitrability.

2.1. Subjective Arbitrability

The issue of subjective arbitrability refers to the capacity of contracting parties in an underlying transaction to conclude a binding arbitration agreement whereby they will submit a dispute arising from such transaction to arbitration for resolution. Apart from the capacity to enter into a binding arbitration agreement, subjective arbitrability is also construed as the capacity of the contracting parties to act as parties to a dispute before arbitration.[9] Parties to an arbitration agreement can be legal and natural persons as well as a State and its agencies. Their capacity is interpreted in light of the solutions accepted in national legislations based on the citizenship or nationality of the party to a dispute. The capacity of natural persons to conclude arbitration agreements is regulated within the scope of legal and business capacity. As regards legal persons, it is necessary to distinguish between private legal persons and legal persons of public law.[10] Private legal persons are generally recognized as having the capacity to conclude arbitration agreements,[11] which is interpreted according to the law of the seat or the nationality of the legal person.

When it comes to legal persons of public law, the situation is somewhat more complicated. When considering this issue, a distinction must be drawn between the capacity of a State and persons of public law to conclude an arbitration agreement (capacity to contract) on the one hand, and the right to invoke immunity, on the other hand. In other words, we should distinguish between the right to enter into an arbitration agreement and the capacity of a person to act

[8] Law on Arbitration, *Official Gazette of the Republic of Serbia*, No.46/200, Art. 5.

[9] Andrea Marco Steingruber, *Consent in International Arbitration*, Oxford University Press, 2012, Item 3.03.

[10] For more on this distinction see Art II of the European Convention on International Commercial Arbitration, *Official Gazette of the SFRY*, No. 12/63.

[11] See. J. Vukadinović (2016), p. 132 ff; In broader sense see Jelena Vukadinović Marković, Vitomir Popović, "(Ne) ugovornice arbitražnog sporazuma kao strane abritražnog postupka: teorija grupe kompanija", *Strani pravni život*, Vol. 66, No. 2, 2022, pp. 187-204.

as a party to arbitration proceedings.[12] We note that a distinction should also be drawn between the cases where a legal person of public law concludes a contract in its own name and for its own account and the circumstances where the implications of the concluded agreement also concern the State. In the latter case, the said legal person should be vested with the authority to act in legal relations in a specific way.[13]

The differences existing in the interpretation of the capacity to enter into an arbitration agreement between legal persons of public and private laws should be sought in the protection of the interest that is to be preserved in a particular dispute. State and its agencies find the motive for concluding certain contracts in the satisfaction and protection of general interests. On the other hand, persons of private law find the motive for concluding certain contracts in the satisfaction of their own, private interests. Hence, the consequences of concluding such contracts are also different. While the consequences of public law contracts are felt by a wide range of persons, this is not the case with contracts concluded by individual legal persons. Sanctions due to non-performance of the obligations assumed are felt in the former case not only by the contracting parties, but also, in a broader sense, by the citizens of the specific State. In this sense, the restrictions of the right of public persons to conclude arbitration agreements are justified by the lack of subjective arbitrability of a particular dispute, and not solely and exclusively by the lack of business capacity as in the case of natural persons. In other words, reasons for denying recourse to arbitration in a specific dispute are not only of a legal but also of a political nature. In this sense, one should understand differences in the interpretation according to which a State and its agencies can agree on jurisdiction of international commercial arbitration but are denied such an opportunity for domestic arbitration agreements.[14] The reasons should be sought in the protection of public interests and not in the lack of legal capacity of a State and its agencies to conclude a valid arbitration agreement.[15]

The right of a State to enter into arbitration agreements can also be deduced from interpretation of the solutions provided by international sources of arbitration law. Thus, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as the New York Convention) does not specify which persons may conclude an arbitration agreement, but it may be inferred from interpretation of Article 1 of the Convention that the Convention also covers the awards made in disputes to which a

[12] Jean Francois Poudrette, Sebastion Besson, *Comparative Law of International Arbitration*, Sweet & Maxwell, 2007, p. 232.

[13] Julian Lew, Loukas Mistelis, Stefan Kroll, *Comparative International Commercial Arbitration*, Kluwer, 2003, p. 735.

[14] Traditional distinction between domestic and international arbitration was recognised in French law, which under Article 83 of the former Civil Procedure Code prohibited the State from concluding arbitration agreements. In practice, courts interpreted this Article as prohibiting the State from concluding domestic arbitration agreements.

[15] In this sense, see decision *Galakis v. Agent Judiciaire of the Treasury.*

State is a party.[16] On the other hand, the European Convention on International Commercial Arbitration allows in Art 2(1) for the possibility of a State concluding an arbitration agreement as a legal person of public law.[17]

The Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter referred to as the Washington Convention) provides in Art 25 Para 1 that the jurisdiction of the Centre for settlement of disputes shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre for dispute settlement.[18] In addition to multilateral agreements, the arbitrability of these contracts is provided for in numerous bilateral agreements on the protection of and incentives to foreign direct investments, the so-called BITs (Bilateral Investment Treaties).[19]

In national laws, the issue of legal capacity of a State and its agencies to conclude arbitration agreements is regulated in different ways. As a general rule, the accepted position is that a State, its bodies, agencies and persons of public authority are entitled to conclude arbitration agreements. The most liberal in this regard are the countries of the common law system, especially Great Britain, which is "a consequence of not distinguishing between legal regimes of public law contracts and private law contracts."[20] Likewise, the domestic Law on Arbitration, Art 5, recognises that "Any natural and legal person, including a State, its bodies, agencies and companies in which the State has ownership interest, can enter into arbitration agreements." This article does not apply solely to the Republic of Serbia, but to any State conducting arbitration proceedings in Serbia. [21]

This general entitlement to enter into arbitration agreements is conditioned by the nature of the legal transaction in which a State and its agencies take part. In cases where public interest prevails, and where a State acts from the *iure imperii* position, recourse to arbitration is excluded. Resolving public law disputes falls to the jurisdiction of national courts. Reasons for this position may be sought in the role of a State in society and the perception of national courts as

[16] Art. 1 of the Convention on the Recognition and Enforcement of Foreign Arbitral Award provides: "The Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether natural or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought".

[17] Art. 2 of the European Convention on International Commercial Arbitration provides: "...legal persons considered by the law which is applicable to them as "legal persons of public law" have the right to conclude valid arbitration agreement".

[18] See Art 25 of the Washington Convention.

[19] Radovan Vukadinović, Jelena Vukadinović Marković, "Arbitrabilnost investicionih sporova iz ugovora o energetskoj povelji", *Pravo i privreda*, Vol. 57, No. 4-6, 2019, pp. 536-555.

[20] Bojana Todorović, *Mehanizmi rešavanja sporova iz upravnih ugovora*, doktorska disertacija, Univerzitet u Beogradu Pravni fakultet, Beograd, 2023, p. 134.

[21] M. Stanivuković, p. 97.

the only authorized bodies that take care of the legal order of a particular State. Hence, prescribing exclusive jurisdiction of national courts aims at safeguarding the sovereignty of the State as an achievement of civilization, and the inviolability of public authority.[22]

However, ascertaining whether public or private interest prevails in a legal relationship is not always a simple matter. In other words, difference between *iure imperii* and *iure gestionis* acts may be drawn based on legal nature of the concluded legal acts and the persons concluding such acts.[23] The public-law nature of a relationship is reflected, among other things, in the fact that the relationship of the contracting parties is one of superiority and subordination, and that State agencies are vested with the authority to conclude the acts under public law. In contrast, *iure gestionis* acts are characterized by the principle of equality of the contracting parties, as well as commercial nature of the assumed rights and obligations. However, even the criteria so defined do not always seem to be a reliable enough indicator, and an interpretation of the nature of a contract must be drawn from the purpose or goal of the act itself. [24]

The reasons for non-arbitrability of public law disputes can be sought in political history. At the beginning of the last century, many developing countries viewed arbitration as a product of capitalism and an attempt at economic neo-colonialism on part of industrially developed countries.[25] With time and under the influence of foreign capital, the rigid attitude towards arbitration began to shift. Opening the market to foreign investors also opened the issue of an adequate forum for dispute resolution. There was, on the one hand, a foreign investor who was not too enthusiastic about the national court of the State in which he invested, while on the other hand, the State, due to its traditional understanding of sovereignty, did not accept the jurisdiction of the national court of another State. Hence arbitration as a neutral, private law forum gained in importance. It is in this light that we may look at the back-door introduction of arbitration to administrative law disputes.[26] In this regard, it is necessary to distinguish between "pure" administrative disputes and those arising from such disputes, which are intrinsically of property law character. In other words, a State or its body or agency, may act as a party to arbitral proceedings in disputes that are objectively arbitrable.

[22] For more see Simon Greenberg, "ICC Arbitration and Public Contracts: The ICC Court's Experience of Arbitrations involving States and State Entities" *Contrats publics et arbitrage international* (ed. Mathias Audit), Bruylant, Bruxelles, 2011, p. 21.

[23] Radovan Vukadinović, *Međunarono poslovno pravo*, Službeni glasnik, Beograd, 2021, pp. 196-199.

[24] In the case of Victory Transport, the court held that certain acts may fall within the category of a public act. It included into such acts: internal administrative acts, such as acts on the status of an alien, acts on nationalisation, acts concerning the armed forces, diplomatic activities and public loans. See also decision in Enterprise Peyrot dispute.

[25] B. Todorović, p. 131.

[26] Aleksandra Maganić, Mihajlo Dika, "Mogućnost rješavanja upravnih stvari arbitražom", *Novosti u upravnoj i upravnosudskoj praksi* (ed. Ante Galić), Organizator, Zagreb, 2018, pp. 17–33. Aleksandra Maganić, "Granice arbitrabilnosti u rešavanju upravnih stvari", *Zakonitost*, No. 1, 2019, pp. 9-18.

2.2. Objective Arbitrability

A State determines its attitude towards arbitration as a private and parallel method of dispute resolution taking into account the scope and categories of disputes that are capable of being settled by arbitration. It was long considered that disputes of a public law character cannot be settled by arbitration, and that the sole and exclusive jurisdiction over such disputes lies with national courts. The grounds for this position were sought in the protection of public interest and the preservation of public order.[27] Public order has a twofold function. On the one hand, it determines the scope of party autonomy of the contracting parties in concluding an arbitration agreement, and on the other hand it sets limits to the recognition and execution of foreign decisions. In the former instance, public order determines the arbitrability of disputes, while in the latter, it shields the sovereignty of the legal order of a particular State.

In other words, whether or not a dispute is capable of arbitration is determined, on one hand, by the inherent nature and scope of the disputed relationship (right of the parties to freely decide on their dispute - to freely dispose of their rights and obligations). On the other hand, it is limited by mandatory rules, public order and good practices of the State of the seat of arbitration.

The Law on Arbitration of the Republic of Serbia provides that parties may resort to arbitration to settle property disputes regarding the rights they can freely dispose of, except for such disputes that are reserved to the exclusive jurisdiction of courts.[28] Broad categories of transactions from the fields of trade, commerce, business or economy are normally cited in the context of disputes wherein the parties can freely dispose of their rights. [29]

3. Arbitrability of Administrative Contracts

First and foremost, there is the question of whether the disputes in administrative contracts may be subjected to arbitration. The answer partly depends on what is considered to be an administrative contract from which a particular dispute may arise. The position broadly taken is that an "administrative contract is a bilateral legal act concluded by a State concerning the public service and for the protection of the public interest, placed under a special legal regime different from general rules of private law, *i.e.* a contract concluded between the public administration and an individual for the purpose of proper functioning of the public service, the notion of public service being of fundamental importance for

[27] Lin Ching-Lang, p. 29; Stavros Brekoulakis, *The protection of the Public Interest in Public Private Arbitration*, Kluwer Arbitration Blog, 3 May 2017.
[28] Law on Arbitration, Art. 5 Para. 1.
[29] J. Vukadinović (2016) p. 126.

the administrative contract".[30] Relevant for the topic of this paper are the administrative contracts concerning public procurement, concessions, public-private partnerships, utility activities and public service activities.[31] Art 22 of the Serbian Law on General Administrative Procedure defines the administrative contract as: "a bilaterally binding written act which, under provisions of a special law, is concluded between an authority and a party and which creates, changes or reverses a legal relationship in an administrative matter". It is characteristic of these contracts that one contracting party is a public authority; that the subject matter of the contract from which a dispute may arise concerns the exercise of public power and/or is interlinked with public interests; that they are subject to a specific legal regime and that the jurisdiction lies with administrative courts.[32]

A distinguishing feature of administrative contracts concerns the participants in the contract. In administrative contracts, one contracting party is always a person of public law.[33] Without going into further analysis of the participants in administrative contract, we note that it is not necessarily the State that concludes these contracts, this can be done by an authority/person vested with the power to sign this type of contract on behalf and for the account of the State. As stated above, the participation of a State or a public administration authority in the dispute, does not *eo ipso* present an obstacle to arbitration. Another distinguishing feature refers to the exercise of public powers, or the protection of public interests that are the object (purpose) of the contract.

The existence of public interest does not in itself preclude recourse to arbitration. The purpose criterion means that the object of the administrative contract is related to a public service, *i.e.* that a contracting party (contrahent), on the basis of such contract, assumes the right and duty to directly perform a public service. Another alternative criterion is the criterion of special powers, according to which a public law entity is given special, greater powers (*e.g.* to unilaterally change contractual provisions or unilaterally terminate the contract), in order to achieve a wider social interest, however in that case, the other contracting the party also enjoys certain rights in respect of the public law entity, or can exercise such rights before the administrative court.

[30] Dejan Milenović, "Upravni ugovori u Zakonu o opštem upravnom postupku zemalja Zapadnog Balkana", *Strani pravni život*, Vol. 61, No. 3, 217, p. 68.

[31] For the purpose of this paper, the contracts on public-private partnership, concessions, public procurement, have been interpreted as administrative contracts. In that sense, see Rajko Pirnat, "Pravni problemi upravne pogodbe", *Javna uprava*, Vol. 36, No. 2, 2000, p. 151-152; Katja Stemberger, "Public and Private Law Aspects of Breach of the Concession Contract under Slovenian Law", *HKJU-CCPA*, Vol. 23, No. 2, 2023, pp. 241-271; Without going into a detailed analysis, we note that there is a different, opposing interpretation according to which the above contracts cannot be treated as administrative contracts. In this regard, we refer to Dejan Milenković, Vladimir Đurić, "Ugovori i projekti javno-privatnog partnerstva i njihov uticaj na lokalni ekonomski razvoj u Srbiji", *Pravo i privreda*, Vol. 60, No. 4, 2022, pp. 695-713.

[32] For terminological definition of administrative contracts see B. Todorović, p. 10 ff. For legal nature of administrative contracts see: Predrag Dimitrijević, "Izvršenje upravnih ugovora", *Pravni život,* Vol 42, No. 11-12, 1993, p. 2252 ff.

[33] For more on parties to an administrative contract see Dražen Miljić, "Upravni ugovori prema zakonu o opštem upravnom postupku", *Zbornik radova Pravnog fakulteta u Novom Sadu*, Vol. 51, No. 2, 2017, pp. 523-524.

A feature of these disputes concerns the potential effect the contract produces on the rights and obligations (interests) of a large number of persons. In other words, the effect of an administrative contract is not limited exclusively to the contracting parties (the so-called relative effect of the contract), but extends to a wider circle of persons, including participants in public procurement, for example those who were not awarded the job, as well as citizens who are the end users of services or works that are the subject matter of the contract. The protection of public interest itself may be the grounds for not recognizing the arbitrability of these disputes, but it does not necessarily present a fact that cannot be disputed.

In comparative law and practice, the arbitrability of disputes in administrative contracts is defined in different ways, depending on the understanding of the concept of public interest.[34] Thus, for example, under Article 2060 of the French Civil Code, the State and its bodies are not permitted to agree to arbitration as a means of settling disputes in which the public interest prevails. On the other hand, this Article refers only to domestic arbitration, and it may be argued that recourse to arbitration is permitted in international business transactions.[35] This view is supported by French arbitration practice.[36] The decision made in *Galakis* case [37] is considered a pioneering decision in French law on recognising arbitrability of disputes in administrative contracts to which one of the parties is a State or a state authority. Arbitrability of international legal disputes in administrative matters was subsequently confirmed in the *Inserm* dispute.[38] Limitations regarding the jurisdiction of arbitration in international disputes arising from contracts

[34] Lin Ching-Lang, p. 15.

[35] J. Perović, p. 110. For more details see Ph. Fouchard, E. Gaillard, B. Goldman, p. 330.

[36] See cases *Galakis*, *Myrtoon Steamship, Walt Disney*.

[37] *Galakis v. Agent Judiciaire of the Treasury,* Cour de Cassation, First Chamber, 2 May 1966.

[38] A dispute arose between the French National Institute for Health and Medical Research (Inserm), a French public entity, and a Norwegian foundation, with respect to an international cooperation agreement. The agreement provided for inter alia the construction in France of a building dedicated to research in neurobiology. It included an arbitration agreement. A dispute arose, and the French party seized a French court, which declined to hear the case because of the existence of an arbitration agreement between the parties. Subsequently, the Inserm requested the Paris First Instance Tribunal to appoint an arbitrator. The arbitrator was appointed and rendered an award in favour of the Norwegian company. A challenge against the award was brought before the Paris Court of Appeal. The Paris Court of Appeal decided that it had jurisdiction to hear the challenge, but rejected it on two grounds. Firstly, it found that the prohibition for States and State entities to arbitrate was limited to domestic contracts, and secondly that, pursuant to the principle of validity of arbitration clauses admitted in French law, the prohibition to arbitrate was not part of international public policy. However, an action was also brought in parallel by the French party before the French administrative courts, which were requested to annul the award on the basis that the arbitration agreement was null and void. The case was directly called to the French highest administrative jurisdiction, the Conseil d'Etat. The Conseil d'Etat decided that there were reasonable doubts with respect to the allocation of jurisdiction between civil and administrative courts, and it therefore decided to raise the case to the Tribunal des conflits, which is the French jurisdiction empowered to settle a conflict of jurisdiction between civil and administrative courts. The Tribunal des Conflits decided that "a challenge against an arbitral award rendered in France on the basis of an arbitration agreement contained in a contract concluded between an entity of French public law and a foreign company, which contract has been performed on the French territory and which concerns the interests of international trade, is to be brought before the court of appeal where the award is rendered pursuant to article 1505 of the Code of Civil Procedure even if the contract is to be characterized as administrative according to French domestic law".

concluded by a State and state authorities pertain to the matters in violation of the French international public order. There is no universally accepted definition of international order, which paves a way for different interpretation of this "elastic" norm, depending on the viewpoint of different national laws.[39] Some of the basic values-principles, or disputes for which there seem to be an agreement that they cannot be resolved by arbitration, concern the corruption of civil servants, drug sales, terrorism, etc.

When it comes to domestic disputes, the situation in French law is somewhat more complex. Disputes in contracts concluded by a State, local authorities, local administrative authorities are treated as disputes relative to the public order which fall under the jurisdiction of administrative courts.[40]

On the other hand, the German legal tradition takes a favourable view of the alternative methods of resolving disputes in administrative contracts.[41] Hence, it is common to have an arbitration clause in public-private partnership contracts concluded by the State with a foreign entity. These are contracts in property law, subject to a decision to conclude a certain legal act.[42] Arbitration proceedings do not seek to assess the legality of the act adopted by the State and its bodies, but rather to resolve the consequences arising from such decision.

In Serbian positive law, the legal protection mechanisms in administrative contracts are only partially regulated by the Law on General Administrative Procedure. Protection of an administrative authority is achieved to a large extent through the power to unilaterally amend or terminate the contract, while the right to damages can be exercised in civil proceedings, before a court of general jurisdiction. On the other hand, the protection of the party is achieved, first of all, by imposing an obligation on the administrative authority to issue a reasoned administrative act - decision, both in cases of contract amendment due to changed circumstances, where the request by the party to adjust the contract to the arising circumstances is rejected, and in cases of contract termination.[43] Depending on whether or not such decision is final, the party can dispute it by first lodging an appeal, and subsequently by bringing an action initiating an administrative dispute, or directly by filing a lawsuit. In the event that a public authority fails to fulfil its contractual obligations, the party may file a complaint with the head of the public authority with which the contract was concluded, and in doing so it may also file a claim for damages. Given that the complaint

[39] For details on the notion of public order see: Slobodan Perović, *Obligaciono pravo*, Beograd 1997, pp. 276-284.
[40] Florian Grisel, "The Private - Public Divide and its Influence over French Arbitration Law: Tradition and Transition", *The (Comparative) Constitutional Law of Private-Public Arbitration*, Oxford University Press, pp. 9 -13, *The Private-Public Divide and its Influence over French Arbitration Law: Tradition and Transition | Florian Grisel - Academia.edu*, 18. 6. 2024.
[41] B. Todorović, p. 296.
[42] Under Art 1030 Para 1 of the German Arbitration Act, any property-related claims can be subject to arbitration, as well as any claims not involving property, to the extent that the parties are entitled to conclude a settlement on the issue in dispute.
[43] Law on General Administrative Procedure, *Official Gazette of the Republic of Serbia*, No.18/2016, 95/2018 – authentic interpretation and 2/2023 – decision of Supreme Court, Art. 23. Para. 2 and Art. 24 Para. 2.

is decided by a decision, the dissatisfied party can dispute it by means of an administrative appeal and/or a court action. At the same time, the Administrative Court may also decide on claims for damages (and return of seized property) as well as accessory claims, although this is not usually the case in practice. Therefore, it depends on the beneficiary of legal protection, which type of protection mechanism will be applied, whether administrative, a court action or a lawsuit.[44] Thus, the illegality of administrative acts passed in connection with the contract will be examined before the Administrative Court. However, if the dispute relates to damages, there is no reason to deny jurisdiction to arbitration. What is more, the Law on Public-Private Partnerships and Concessions provides that "parties to a public contract may agree to settle any disputes arising from such contract by domestic or international arbitration"[45], which leads to the inevitable conclusion that disputes in public-private partnership and concessions are arbitrable. This practically means that disputes in concession contracts, as a type of administrative contracts, cover obligation rights and duties that the parties may freely dispose of and are therefore arbitrable.[46] The arbitrability of concession disputes is also confirmed by the provisions of the Croatian Law on Concessions, which stipulate that the parties may agree to arbitration, unless otherwise specified by a special law.[47] It is worth noting that arbitration is possible only in disputes that occur in the phase following the conclusion of the contract, that is, in connection with its execution, and not in disputes related to the procedure for awarding public contracts.[48]

The issue of determining the scope of objective arbitrability of these disputes should also be interpreted through the lens of stipulated exclusive jurisdiction of state courts. It is rightly pointed out that decisions concerning exclusive jurisdiction qualify objective arbitrability.[49] However, commentators have argued that in certain cases, the exclusive jurisdiction of national courts does not affect arbitrability, if arbitration has been agreed upon. In theory, this phenomenon is called relative exclusive jurisdiction, and the field of foreign investments and concessions is cited as an example.[50]

In support of relative interpretation of exclusive jurisdiction of the courts, we also cite Art. 60 of the Law on Public-Private Partnership (PPP), which stipulates that only if "the parties have not agreed on dispute resolution by arbitration, the courts of the Republic of Serbia have exclusive jurisdiction". It may be properly

[44] For more details see: B. Todorović, p. 314 ff.

[45] Law on Public-Private Partnership and Concessions, *Official Gazette of the Republic of Serbia,* No. 15/2016 and 104/2016, Art. 60.

[46] Dario Đerđa, "Ugovor o koncesiji", *Croatian Public Administration*, No. 3, 2006, pp. 88-89.

[47] Art 97 Para 2 of Croatian Law on Concessions. For more on arbitrability of administrative contracts in Croatia see A. Maganič, "Granice arbitrabinosti", *Zakonitost*, No. 1, 2019, p. 11 ff.

[48] B. Todorović, p. 354 ff.

[49] Marko Knežević, "O pojmu i značaju arbitrabilnosti", *Zbornik Pravnog fakulteta u Novom Sadu*, Vol. 42, No. 1-2, 2008, p. 882.

[50] Vladimir Pavić, "National Reports: Serbia", *World Arbitration Reporter* (WAR), 2nd Edition, (eds. Loukas Mistelis, Laurence Shore, Hans Smit), JurisNet LLC, 2010, 3, 13–14.

concluded from interpretation of this article that arbitration is recommendable as a method of settling disputes in public-private partnerships.

We can observe public procurement disputes in the same vein. In the phase preceding the conclusion of the transaction, the announcement of tenders and the implementation of the public procurement procedure, the disputes that arise are resolved before the authority provided for in the Law on Public Procurement.[51] These disputes concern the legality of the procedure, omission to take actions and decision-making in the public procurement procedure, legality of public procurement contracts, etc. Judicial protection against the decisions of the competent Commission is available in the administrative procedure before the administrative court. However, the concern of legal relations that arise following the conclusion of the transaction is the prestation that has a pecuniary value. In this sense, disputes in damages arising from a violation of the law on public procurement are objectively arbitrable. In other words, deciding on damages arising in connection with the execution of a certain administrative contract falls under the jurisdiction of courts of general jurisdiction, and in this regard, we see no reason why the same claim cannot be decided by arbitration. Since in that case we are talking about property claims that the parties may freely dispose of, we can conclude that the settlement of such disputes in administrative contracts by arbitration is permissible under the Law on General Public Procedure.

4. Conclusion

There are lots of benefits of the alternative and consensual dispute resolution that courts generally cannot match. Some of them are simpler, more flexible and faster procedures, more effective dispute resolution according to the principle of fairness and not merely following strict legal rules, lower costs, confidentiality of the process, risk diminishing, parties control over the procedure, amicable settlement, higher satisfaction of the parties with the achieved result and, because of that, better acceptability of decisions by the parties.[52] However, arbitration can decide only in those disputes that are subjectively and objectively arbitrable. Traditionally, administrative disputes were considered not to be arbitrable. The reasons for such an interpretation can be sought on the one hand in the persons concluding a transaction governed by administrative law, and on the other hand, in the public interest, sought to be preserved within the scope of jurisdiction of the state court. With time, however, this position was given a more liberal interpretation, especially with regard to the contracts between a State as a public law entity and persons in public or private foreign law, in the matter of public-private

[51] Public Procurement Law, *Official Gazette,* No. 91/2019 and 92/2023, Art. 187.

[52] Dario Đerđa, Joanna Wegner, "Non-jurisdictional Forms of Disposing an Administrative Matter: Croatian and Polish Experiences", *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 41, No. 1, 2020, p. 47.

partnerships, concessions and public procurement. This is attested by solutions provided by corresponding laws.

It is in this light that we should consider whether or not arbitration can find its place as a dispute resolution mechanism in the solutions of the Law on General Administrative Procedure.

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IMA LI MESTA ARBITRAŽI U SPOROVIMA IZ UPRAVNIH UGOVORA

Sažetak

Predmet rada predstavlja analiza arbitrabilnosti sporova iz upravnih ugovora s posebnim osvrtom na sporove iz ugovora o javno-privatnom partnerstvu, koncesijama i javnim nabavkama. Prvi deo rada posvećen je definisanju opšteg pojma arbitrabilnosti. Pažnja je usmerena na određivanje subjektivne i objektivne arbitrabilnosti sporova. U drugom delu rada razmatra se pitanje da li je arbitraža kao način rešavanja sporova dozvoljena u upravnim ugovorima. Tumačenjem normativnih rešanja kao i arbitražne i sudske prakse predlaže se priznavanje arbitrabilnosti i ovoj vrsti sporova.

Ključne reči: upravni ugovor, arbitraža, subjektivna arbitrabilnost, objektivna arbitrabilnost

CIP - Каталогизација у публикацији
Народна библиотека Србије, Београд

340.134:35.077.3(497.11)(082)

LAW on general administrative procedure : contemporary tendencies and challenges : thematic collection / [edited by Srečko Devjak, Predrag Dimitrijević]. - Belgrade : Eurosfera & Partners : The Institute of Comparative Law ; Ljubljana : MLC Faculty of Management and Law, 2024 (Belgrade : Eurosfera & Partners). - 369 str. : graf. prikazi, tabele ; 24 cm

"The regional conference, on the topic 'Analysis of the Law on general administrative procedure in the service of the economy and citizens,' organized by the consulting firm 'Eurosfera,' which was held with the support of the National assembly of the Republic of Serbia, enabled a professional, collegial, and well-argued discussion of all current aspects of the Law on general administrative procedure, particularly on the effects of its implementation. The conference also served as an immediate inspiration for the creation of this collection of papers on this ever-relevant topic." --> Administrative legislation under the microscope. - Na spor. nasl. str.: Закон о општем управном поступку: савремене тенденције и изазови: тематски зборник. - Tiraž 100. - Napomene i bibliografske reference uz tekst. - Bibliografija uz svaki rad.

ISBN 978-86-82582-23-6 (ICL)

а) Управно право -- Зборници б) Управни поступак -- Законодавство -- Србија -- Зборници

COBISS.SR-ID 158363657