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Edited by

S. Kröll, L.A. Mistelis, P. Perales Viscasillas & V. Rogers



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CHAPTER 24

(IN)ARBITRABILITY AND EXCLUSIVE JURISDICTION

Parallels That Matter

1. INTRODUCTION – A CASE STUDY

Deciding upon a request for recognition and enforcement of a foreign arbitral award, the Commercial Court in Zagreb, Croatia refused to enforce an order of 22 November 2007. In the grounds for decision, the Court explained that ‘the subject matter of the dispute was not arbitrable because under Croatian law the dispute was subject to the exclusive jurisdiction of a court in the Republic of Croatia’.¹

The arbitral award in that case was a result of an *ad hoc* arbitration with a seat in Switzerland. The dispute was between a Croatian and a British party, arising out of a contract for the lease of covered and uncovered land on the site of one Croatian port. The claim was related to the alleged underpayment or non-payment of the rent, whereby the point in dispute was the basis for calculation of the rent.

The award finally rejected the claims for payment of extra rent, and awarded the costs to the other party. As the losing party refused to pay the costs of the proceedings, the Swiss award had to be recognized and enforced in Croatia. Opting to have the award recognized incidentally, rather than in separate proceedings, the claimant commenced the enforcement of the decision on costs at the Commercial Court in Zagreb.

* Professor of Law, University of Zagreb..

¹ Decision of the Commercial Court in Zagreb no. Ovr-3101/07-15.

After rejection of the claim for enforcement, the case arrived upon appeal to the High Commercial Court, which only reconfirmed the decision to refuse enforcement. Again, the reason was the lack of subject-matter arbitrability.² *Inter alia*, the court referred to Art. 40 para. 2 of the Croatian Law on Arbitration³ in connection with Art. 56 of the Law on International Private Law⁴ under which the disputes on rights *in rem* concerning immovable property, including disputes on the lease of real estates, are falling within the exclusive jurisdiction of the courts in the Republic of Croatia, if the immovable property is situated on the Croatian territory. As this rule explicitly excluded the jurisdiction of foreign courts, it was also applicable to foreign arbitrations as well.

The applicant was also objecting to the refusal of enforcement on the basis that the enforcement related to the costs of proceedings, which was an ancillary claim that had nothing to do with any matter which might have been problematic from the perspective of subject-matter arbitrability. Due to that reason, the applicant argued that Art. V(1)(c) of the 1958 New York Convention had to be applied. Yet, the High Commercial Court rejected such an objection in a summary way, finding that the New York Convention was not applicable at all to the case at hand. Namely, although Croatia ratified the NYC, it also maintained the reservation under which the Convention was applicable only to differences arising out of legal relationships that are considered commercial under the national law. As the British party was not a commercial company, but a state entity, the dispute was not commercial, and consequently only national law of arbitration had to be applied.⁵ As a secondary appeal to the Supreme Court is in enforcement cases not admissible⁶, the decision to refuse the enforcement was final.

² Decision of the High Commercial Court in Zagreb no. Pž-3932/08-3 of 20 August 2008 (previously unpublished).

³ Recognition and enforcement of a foreign award shall be refused if the court finds that "... a. the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Republic of Croatia." See Law on Arbitration, Off. Gaz. RC 88/01.

⁴ Law on International Private Law (LPIL), Off. Gaz. SFRY 43/82, 72/82; Off. Gaz. RC 53/91, 88/01.

⁵ On the other hand, had NYC been applied, the outcome would have hardly been different, since national law (the Law on Arbitration) follows closely the provisions of the NYC. However, the court considered that Art. 36 para. 2d. of the LA (which is in content same as the Art. V(1)(c) of the NYC) is not applicable either, since the case was about (non)arbitrability of the subject-matter, and not about a dispute not falling within the terms of the submission to arbitration, or about decisions on matters beyond the scope of the submission to arbitration.

⁶ Had the applicant opted to raise the issue of recognition in a separate proceedings, where it would be treated as the main issue (and not decided only incidentally), the appeal to the

2. (IN)ARBITRABILITY REDISCOVERED

As the above case illustrates, the issues of arbitrability are far from being closed. The Croatian example, although dependent on national law of one country, may be representative for a whole series of other jurisdictions. Indirectly, this is demonstrated by the new interest of the UNCITRAL to explore the topic of arbitrability as one of the future topics of its work, with a view to promote harmonization in this area.⁷ Another proof is the new wave of academic interest for this topic. As stated in a recent publication, ‘the subject of arbitrability continues to attract the interest of scholarly writing as the discussion on the matter is far from settled yet.’⁸

The very notion of arbitrability was not so long ago relatively unknown, as many other issues concerning development of international standards of commercial arbitration stood at the forefront. The international interest in the matters of arbitrability gained on popularity mainly in the last two decades, after the global success of the Model Law on International Commercial Arbitration and the other initiatives of the UNCITRAL. The differences in the legislation on international arbitration are no more playing a decisive role; what remains, however, are the differences in the national legal cultures and the styles of legal proceedings, which are deeply rooted in history and procedural routines of national legal systems. The perceptions of kinds of issues that are appropriate for arbitration, and of the issues that should be excluded from it, depend on a number of specific factors. Most of the reasons for inarbitrability are derived from the considerations of public policy.⁹ In spite of remarkable expansion of arbitration in the past

Supreme Court would have been possible under Art. 49 para. 5 LA. The legislative regime providing different jurisdiction regarding the same issue, depending whether it was raised as a main issue, or within the enforcement proceedings, was criticized in Siniša Triva & Alan Uzelac, *Hrvatsko arbitražno pravo* [Croatian Arbitration Law], (Zagreb: Narodne novine, 2007), 398-399.

⁷ Arbitrability was listed as third among thirteen other topics (after conciliation and requirement of written form) as a possible topic for consideration by the UNCITRAL in the Secretariat Note of 6 April 1999, produced upon request by the Commission issued at the New York Convention Day held on 10 June 1998. See UNCITRAL Document A/CN.9/460. As per 2009, the arbitrability is still high on the list of future topics which will most likely come to agenda after the topic of transparency in treaty-based investor-State arbitration – see UNCITRAL, ‘Report of Working Group II on the work of its fifty-first session’, A/CN.9/684, para. 6.

⁸ Stavros L. Brekoulakis, ‘On Arbitrability: Persisting Misconceptions And New Areas Of Concern’, in Loukas A. Mistelis & Stavros L. Brekoulakis, *Arbitrability. International and Comparative Perspectives* (Kluwer, 2009), 19.

⁹ See Karl-Heinz Böckstiegel, ‘Public Policy and Arbitrability’ in P. Sanders (ed), *ICCA Congress Series No. 3* (Deventer: Kluwer Law & Taxation, 1987), 177; Loukas A. Mistelis, ‘Arbitrability – International and Comparative Perspectives’, in A. Mistelis & Stavros L.

decades, it can hardly be argued that all kinds of disputes are equally appropriate to be submitted to arbitration. All states have a legitimate interest to reserve at least some types of disputes for the monopoly of their public justice system. The submission of a dispute to arbitration limits considerably the controlling functions of the state courts, which cannot correct, revise or annul the arbitral awards for any types of mistakes (*revision au fond*) but can only exercise their function with respect to a small set of mainly procedural errors (*controle limité*). The reasons to limit arbitration are more pronounced if the seat of arbitration is outside of the national territory, as in such a case universal control of the arbitral award will be possible only by setting aside action at the competent foreign court. Eventual opposition to enforcement may render the award ineffective on the national territory, but cannot prevent enforcement in the other jurisdictions. For all these reasons, many jurisdictions consider that certain disputes need to remain within the ambit of their national jurisdiction, where their resolution would be within the range of monitoring and supervision of the courts of law.

3. THE NOTION OF EXCLUSIVE JURISDICTION

The issue whether certain dispute should be submitted to a certain court obviously surpasses the questions of arbitrability. The debate about what forum is more or less convenient for a particular dispute can be discussed at several levels: first, at the level of national courts' jurisdiction, where it raises the questions regarding jurisdiction of courts of different type, level and territorial competence; second, at the level of distributing jurisdiction for particular cases among the public courts of different national jurisdictions; the third and the last level distinguishes court jurisdiction from out-of-court dispute resolution methods, including arbitration (whereby, again, the sub-topic may be related to the seat of such dispute resolution methods). Those dealing with matters of arbitrability often tend to forget that a similar, and historically older situation, exists in relation to the general questions of jurisdiction in international private law. The approach to the arbitrability in many legal cultures is influenced by the general notions about the desirable and undesirable jurisdictions.

The difficulty to approach arbitrability in a general and universal manner at the international level was recognized also by the UNCITRAL. The Commission made a following remark at its thirty-ninth session in June-July 2006:

Brekoulakis, *Arbitrability. International and Comparative Perspectives* (Austin etc.: Kluwer, 2009), 1-5.

The topic of arbitrability was said to be an important question, which should also be given priority. It was said that it would be for the Working Group to define whether arbitral matters could be defined in a generic manner, possibly with an illustrative list of such matters, or whether the legislative provision to be prepared in respect of arbitrability should identify the topics that were not arbitral. It was suggested that studying the question of arbitrability in the context of immovable property, unfair competition and insolvency could provide useful guidance for States. It was cautioned however that the topic of arbitrability was a matter raising questions of public policy, which was notoriously difficult to define in a uniform manner, and that providing a predefined list of arbitral matters could unnecessarily restrict a State's ability to meet certain public policy concerns that were likely to evolve over time.¹⁰

The principles of party autonomy and the freedom of contract are among the most fundamental principles of (international) arbitration. However, the unlimited freedom of choice does not exist, not even in the context of arbitration. Carbonneau and Janson argued that arbitrability 'determines the point at which the exercise of contractual freedom ends and the public mission of adjudication begins'.¹¹ Naturally, the both concepts – the concept of natural and appropriate forum for adjudication, and the concept of individual right to choose the venue for dispute resolution – are in a stark opposition. As noted by Loukas Mistelis, 'arbitrability is one of the issues where the contractual and jurisdictional natures of international commercial arbitration collide head on'.¹²

Turning back to the jurisdictional concepts, it is broadly accepted that the courts may have a jurisdiction which is either exclusive (*forum exclusivum*) or concurrent (*forum electivum*). If a court has exclusive jurisdiction (over particular parties, territory and/or subject-matter), only that court is legally authorized to deal with a specific type of cases. On the contrary, if a court has concurrent (shared) jurisdiction, it may address the matter, but the same matter may also be addressed by other courts – and also by other formal methods which bypass the courts, arbitration being the most prominent one.

¹⁰ UN, 'Official Records of the General Assembly, Sixty-first Session, Report on the work of the Commission', Supplement No. 17 (A/61/17), para. 185. See also A/CN.9/684, para. 4.

¹¹ T. Carbonneau & F. Janson, 'Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability', *Tulane Journal of International & Comparative Law* 2(1994): 194.

¹² Loukas Mistelis, 'Arbitrability', at 3.

The notion of exclusive jurisdiction is not only embedded in national laws, but exists also at supra-national and international levels. More than a few international, multilateral and bilateral agreements provide that certain disputes fall within the exclusive competence of the courts of a particular state.¹³ Good examples of acts with comprehensive scope and a high practical significance can be found in the EU law. Both 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters¹⁴ and the newer EU Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 22 December 2000¹⁵ contain provisions on exclusive jurisdiction. Although the very notion of exclusive jurisdiction is not defined in either of these documents, the both acts speak of the courts which should have exclusive jurisdiction regardless of domicile, and provide that such jurisdiction will be with the courts of a particular member state. For the topic of arbitrability, the most relevant are the provisions which define the effect of exclusive jurisdiction on the agreements on jurisdiction. Under Art. 17 para. 3 of the Brussels Convention and Art. 23 para. 5 of the Regulation, prorogation agreements, including all other instruments conferring jurisdiction 'shall have no legal force if ... the courts they purport to exclude have exclusive jurisdiction'. Although arbitration agreements are not expressly covered in the cited instruments, it is not doubtful that by their virtue jurisdiction of national courts is excluded as well. The list of matters in which exclusive jurisdiction is provided includes proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, proceedings which have as their object the validity of entries in public registers, proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, and proceedings concerned with the enforcement of judgments.¹⁶

¹³ E.g. Vienna Convention on Civil Liability for Nuclear Damage of 1963; International Convention on Civil Liability for Oil Pollution Damage of 1969; Uniform Rules concerning the Contract for International Carriage of Passengers and Luggage by Rail (CIV-COTIF).

¹⁴ Known also as one of the most successful international agreements in the history of international private law. See Art. 16 (Exclusive jurisdiction).

¹⁵ *Official Journal of the European Communities*, No 44/2001. See Art. 22 (Exclusive jurisdiction).

¹⁶ See Art. 22 para. 1, p. 1- 5 of the Regulation; Art. 16 para. 1 p. 1-5 of the Brussels Convention.

In the following chapter we will present the issue of (in)arbitrability with respect to exclusive jurisdiction from the perspective of Croatian law. As it will be shown, Croatian law on exclusive jurisdiction is not very far from the provisions of the EU law (although at the present point Croatia is still not an EU member). However, the category of exclusive jurisdiction could be – and is, as in the example described in the introduction – an important impediment to the arbitration and/or enforceability of arbitral awards in a number of disputes.

4. EXCLUSIVE JURISDICTION AS AN OBSTACLE TO ARBITRATION UNDER CROATIAN LAW AND PRACTICE

Prior to 2001, any provisions on exclusive jurisdiction were generally taken as the absolute ban of arbitration in all matters covered by them, irrespective of the type and venue of arbitration. This was a regulation inherited from the former Yugoslav Code of Civil Procedure, which permitted arbitration if several conditions were simultaneously met, including the dispositive nature of the subject-matter of dispute, and the absence of exclusive court jurisdiction of Croatian courts of law.¹⁷

When the reform of the arbitration law came on the agenda, the issue of exclusive jurisdiction was a topic of a lively debate, with a number of proposed interim solutions.¹⁸ Generally, the intention was to broaden the scope of arbitrability and enable arbitration in some disputes previously covered by the reservation of exclusive court jurisdiction, but at the same time the reformers were aware that unlimited freedom to arbitrate all pecuniary claims was not acceptable.¹⁹ Ultimately, a balanced solution was adopted.

The 2001 Law on Arbitration is based on a differentiated approach to exclusive jurisdiction as an impediment to arbitration, inspired by a similar approach of

¹⁷ See Art. 469 and 469a of the 1976 Code of Civil Procedure (CCP).

¹⁸ For some of the interim solutions and proposals see Mihajlo Dika, 'Arbitrability and Exclusive Jurisdiction of Courts of Law', *Croatian Arbitration Yearbook* 6 (1999): 27-43.

¹⁹ See in more detail in Alan Uzelac, 'New Boundaries of Arbitrability Under the Croatian Law on Arbitration', *Croatian Arbitration Yearbook* 9(2002): 139-159, in particular at 150:

extensive limitations of arbitrability by means of "exclusive jurisdiction doctrine" ... were not only practically unacceptable, but also theoretically untenable, since they imposed restrictions there, where in the new circumstances of the market economy and political democracy, founded on the rule of law, there were no convincing legal or political grounds.

international conventions on jurisdiction (including the provisions of the EU law cited above). Since in the international context the rules on exclusive jurisdiction do not prevent member states from adopting various, also concurrent rules on jurisdiction, as long as the cases remain within the auspices of the justice system of the designated member state, it was concluded that the same approach should be stretched to include arbitration as well. Thus, irrespective of the nature of the case (domestic or international), agreements on arbitration are valid if they provide for arbitration with a seat on the national territory (i.e. if the arbitration agreements result in an arbitration that would be legally considered as ‘domestic arbitration’). The only remaining condition for such arbitration agreements was the dispositive nature of the claims in dispute.²⁰

For the agreements on arbitration with the seat abroad (i.e. for agreements on arbitrations that are not governed by the national law) the limitation of exclusive jurisdiction was maintained. It stretches into two directions: as *ratione materiae* limitation (i.e. with respect to subject-matter of the dispute), and as *ratione personae* limitation (i.e. with respect to the capacity and status of the parties in the dispute).

The first limitation derived from the notion of exclusive jurisdiction defines the borders of *objective (in)arbitrability*. Namely, in addition to the general requirement of dispositive nature of the claims in dispute, *external arbitrability* (i.e. the ability to conclude an agreement on arbitration with the seat outside the Croatian territory) is limited by another requirement – ‘unless it is provided by law that such a dispute may be subject only to the jurisdiction of a court in the Republic of Croatia’.²¹ This formula indicates all matters in which exclusive jurisdiction is expressly provided.²²

The second limitation may be described as the limitation of *subjective (in)arbitrability*.²³ It is again following the logic of the prorogation rules of the

²⁰ See Art. 3 para. 1 of the Law on Arbitration: ‘Parties may agree on domestic arbitration for the settlement of disputes regarding rights of which they may freely dispose.’

²¹ Art. 3 para. 2.

²² Under Art. 47 of the Croatian LPIL, exclusive jurisdiction exists in all cases where it is expressly provided by that law or another law.

²³ For the notion of ‘subjective arbitrability’ as the entitlement of parties to submit their disputes to arbitration see e.g. Fouchard/Gaillard, Goldman, *On International Commercial Arbitration* (Deventer: Kluwer, 1999), 313-315, para. 534. Focusing on international arbitration, Fouchard refers ‘in particular’ to the issue of the capacity of states and public entities, yet the general description of the issue later called ‘subjective arbitrability’ is whether ‘certain individuals or

international private law. Under these rules, the parties may agree on the jurisdiction of a foreign court only if one of them is a foreign citizen or a legal person with a seat abroad.²⁴ In the similar wording, it is provided that an agreement on arbitration with a seat abroad ('foreign arbitration') is permitted only in disputes 'with an international element', i.e. in the disputes in which at least one party is a natural person with domicile or habitual residence abroad, or a legal person established under foreign law.²⁵

From the perspective of Croatian law, the arbitration agreements which would be concluded contrary to the provisions on exclusive jurisdiction would be *ab initio* null and void, both in cases of breaches of rules on subjective and objective inarbitrability.²⁶ The consequences of exclusive jurisdiction are defined in the leading textbooks of civil procedure in rather harsh terms:

The provisions on exclusive jurisdiction eliminate general and any other territorial jurisdiction except the one expressly provided by law. The application of the rules on exclusive jurisdiction cannot be waived or changed, not even by the parties' agreement on prorogation of jurisdiction.... Differently from all other rules on territorial jurisdiction, the courts have to take into account the exclusive jurisdiction *proprio motu*.²⁷

Consequently, for agreements that would provide for foreign arbitration in a matter covered by exclusive subject-matter jurisdiction of national courts, or for foreign arbitration in a 'pure' domestic dispute the following consequences would apply:

- If a court action between the same parties in the same dispute would be commenced, the state courts would have to reject any respondent's objections and assume the jurisdiction, finding that the arbitration agreement is null and

entities are considered unable to submit their disputes to arbitration because of their status or function' (*ibid.* at 312-313). On 'subjective arbitrability' as 'capacity of the parties to submit disputes to arbitration' see also Domenico Di Pietro, 'General Remarks on Arbitrability Under the New York Convention', in Mistelis/Brekoulakis, *cit. supra* note 8, at 91 (5-3).

²⁴ LPIL, Art. 49 para. 1.

²⁵ LA, Art. 3 para. 2 in relation to LA, Art. 2 para. 1(7).

²⁶ Under the Law on Obligations (LO), Off. Gaz. RC 35/05, an agreement concluded contrary to mandatory provisions of law is null and void, unless the objective of the infringed rule refers to some other legal effect or the law provides otherwise for such particular case (Art 322 para. 1).

²⁷ See Siniša Triva & Mihajlo Dika, *Gradansko parnično procesno pravo* [The Law of Civil Litigation] (Zagreb: Narodne novine, 2004), 277, § 54/7.

void;²⁸

- If an arbitral tribunal would make an award in such a dispute, the award would not be recognized as binding, because the court would *ex officio* find that the subject-matter is not capable of settlement by arbitration (in cases of objective inarbitrability) or that the recognition would be contrary to the public policy (in cases of subjective inarbitrability);²⁹
- In the enforcement proceedings, the court would not recognize the award in the incidental proceedings, and would consequently refuse the enforcement.³⁰

The ban on foreign arbitration in cases where exclusive jurisdiction is provided does not have an impact on the ability of the parties to agree on a ‘domestic’ arbitration in which foreign arbitrators would arbitrate, foreign language would be used and foreign law would be applicable to the substance of the dispute. Equally, the parties may in such cases agree on foreign or international arbitration rules (e.g. the UNCITRAL Rules) and the arbitration may be administered by foreign arbitral institutions (e.g. by the ICC); yet, the legal seat of such arbitration should be in Croatia.

The cases in which exclusive jurisdiction is provided are not listed in one single place. They are scattered in a number of acts. Leaving out the cases of exclusive jurisdiction under bilateral or multilateral treaties, the most important disputes where exclusive jurisdiction is provided in national legislation are the following:

- *immovable property*: disputes regarding property rights and other rights *in rem* regarding immovable property; disputes about trespassing on immovable property; disputes concerned with the rent or lease of immovable property; disputes regarding tenancies or the use of housing apartments or business premises;³¹ disputes regarding immovable property as an object of inheritance;³²

²⁸ Art. 42 para. 1 LA. See also Supreme Court decision of 10 May 2005, Revt 37/05-2, Gzz 77/05-2.

²⁹ See Art. 40 para. 2(a) and 2(b) LA.

³⁰ Ibid. The latter happened in the case cited in the introduction of this paper.

³¹ Art. 56 para. 1 CCP and Art. 56 LPIL.

³² Art. 71 para. 4 and Art. 72 para. 3 LPIL.

- *aircrafts and ships*: disputes concerned with the ownership and other rights *in rem* regarding aircrafts, sea vessels or inland navigation vessels; disputes regarding lease of aircrafts and ships;³³ some disputes regarding limitation of carriers liability;³⁴ disputes regarding distribution of funds from the limited liability fund for damages caused by oil spills.³⁵
- *military units*: disputes arising from relations with military units;³⁶ disputes concerned with the rewards for the salvage of Croatian military ships and Croatian public ships; disputes regarding claims for damages for collision of ships, if one of the ships is a Croatian military ship;³⁷
- *enforcement*: disputes arising out of or relating to the proceedings of court or administrative enforcement;³⁸ disputes arising out of or relating to enforcement on ships;³⁹
- *bankruptcy*: disputes arising out of or relating to the bankruptcy proceedings;⁴⁰
- *companies*: disputes regarding the obligation to notify the shareholders;⁴¹ disputes which have as their object the claims for annulment of the decisions made by the general meetings of the shareholders, or establishment that its decision was null and void;⁴² disputes concerned with the dissolution of companies.⁴³

Certain doubts exist also in respect to the arbitrability in matters of registration or validity of patents, trade marks, designs or other aspects of registration or validity of **intellectual property**. In spite of the lack of express provisions on exclusive jurisdiction, the very fact that certain of these matters can only be decided by the

³³ Art. 57 para. 1 CCP.

³⁴ Art. 1009 para. 2 of the of the Maritime Code (MC), Off. Gaz. 17/94, 74/94, 43/96; Art. 414 of the New Maritime Code (NMC), Off. Gaz. RC 181/04, 76/07 and 146/08.

³⁵ Art. 822 NMC.

³⁶ Art. 61 CCP.

³⁷ Art. 1009 para. 1 MC; Art. 988 NMC.

³⁸ Art. 63 CCP.

³⁹ Art. 1009 para. 3 MC; Art. 988 NMC.

⁴⁰ Art. 63 CCP.

⁴¹ Art. 288 para. 1 of the Company Act (CA), Off. Gaz. RC 111/93, 34/99, 52/00, 118/03; 107/07 and 146/08.

⁴² Art. 363 CA.

⁴³ Art. 468 CA.

administrative body (State Intellectual Property Office) leads to conclusion that in such matters arbitration (also the domestic one) is excluded.⁴⁴ Some further doubts exist regarding the arbitrability of **unfair competition (antitrust) disputes**⁴⁵ and the issues of validity of entries in **public registers**, but they are also less relevant for this paper, as they are not arising out of the concept of exclusive jurisdiction *stricto sensu* but appear on other grounds, such as the non-contentious character and/or the administrative nature of the default processes.⁴⁶ According to a decision of the Supreme Court, disputes regarding the validity of the **termination of employment contract** are also not arbitrable, due to the fact that dismissal is regulated by strict rules of law, and thus such disputes do not deal with the rights that can be freely disposed.⁴⁷

5. CONCLUSIONS

As the Croatian example demonstrates, the topic of arbitrability has to be taken seriously when drafting arbitration clauses. The times when arbitration was reserved for a narrow fraction of international commercial disputes are long gone. Yet, it is equally wrong to assume the uncritical position of the arbitral universalism – the position that all parties can agree on all types of arbitration in all disputes. Whether we like it or not, we cannot but agree with Redfern & Hunter, who stated:

Whether or not a particular type of dispute is ‘arbitrable’ under a given law is in essence a matter of public policy for that law to determine.⁴⁸

The issues of public policy are, however, not only pertinent to the field of international arbitration. The public policy considerations are relevant for the whole range of jurisdictional issues that are not necessarily linked to arbitration. Thus, when analysing the issues of arbitrability, overlapping with the general rules of international civil procedure is inevitable, in particular in relation to the issue of permissibility of prorogation (‘prorogability’). The notion of ‘exclusive jurisdiction’ is the clearest point where the two worlds meet.

⁴⁴ See more in Nives Povrženić, ‘Arbitrability of industrial property disputes’, *Croatian Arbitration Yearbook*, 12(2005), 25-44.

⁴⁵ For an early account of this topic see Edita Čulinović-Herc, ‘Arbitrability of Unfair Competition Disputes’, *Croatian Arbitration Yearbook* 3(1996): 57-70.

⁴⁶ See Aleksandra Maganić, ‘Arbitrability in non-contentious matters’, *Croatian arbitration yearbook*, 15(2008): 113-144.

⁴⁷ Supreme Court of the RC, decision of 21 January 2009, Revr 500/08-2.

⁴⁸ Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, (London: Sweet & Maxwell, 2004) 164 (3-13).

Of course, the parallelism between arbitrability and the international rules on exclusive jurisdiction could be attacked. One can try to diminish the role of public policy in respect to either provisions on arbitrability, or provisions on international jurisdiction. One can try to invent fundamental differences between the transfer of jurisdiction to (foreign) arbitration tribunals and (foreign) juridical fora. Yet, in all fairness, such arguments may be ultimately convincing only for uncritical fans of arbitration (or self-interested arbitration practitioners). Why should e.g. a Polish and a Dutch party be prevented from agreeing on the jurisdiction of a commercial court in Germany, while they are authorized to agree on arbitration in Germany? No matter how we put it, both types of agreements on the competent venue affect the 'natural' rules on default jurisdiction and lead to derogation of jurisdiction of the otherwise competent legal system. The both types of agreements are also an exercise of the party autonomy in the choice of forum that they consider most appropriate for their dispute. Today, when some courts (e.g. in England or Germany) start to act consciously as arbitral institutions, offering flexible dispute resolution services and well-developed infrastructure to the broadest circle of potential parties, differences between public and private dispute resolution mechanisms are even further blurred.

Insofar, the regulation which tries to coherently harmonize the rules of international civil procedure with the rules of arbitrability is principally not flawed, but rather logical. The cited position of the Croatian arbitration law, which – for the dispositive disputes – equalizes requirements for the transfer of jurisdiction to foreign courts with the requirements for the transfer of jurisdiction to foreign arbitration tribunals, has its rational justification. If many national laws, as well as some international conventions and EU regulations distinguish a number of matters for which the courts of the particular national legal order should be exclusively competent, then it is certainly imaginable that a certain state would like to prevent circumvention of that rule and 'escaping' of disputes regarding those matters to other jurisdictions via arbitration agreements. The Croatian Law on Arbitration has attempted to use the least invasive limitation, assuming that agreements on arbitration with a seat on the national territory are not to be treated as 'escape' from the court control, since they allow a sufficient level of general control of the compatibility of the results of arbitration with public policy. Namely, domestic arbitral awards (awards not having a seat abroad) may be challenged by setting aside action within the national legal system, with public policy being one of the grounds for annulment. Foreign arbitral awards, on the contrary, do not offer such an option of ultimate control of the compatibility with very basic body of principles that underpin the operation of legal system. Thus, if a matter is otherwise such that, for public policy reasons,

under local or international rules on exclusive jurisdiction it can be adjudicated only by domestic courts, it can be submitted to arbitration locally, but foreign venue may not be agreed upon.⁴⁹

While admitting that the notion of exclusive jurisdiction has a convincing rationale as one among the elements that influences rules on arbitrability, one should also admit the difficulties that arise when trying to determine the scope and concrete cases of exclusive jurisdiction. The list of matters covered by exclusive jurisdiction could also be questioned in the light of changes in law, society and international trade practices.

A significant difficulty is contained in the residual ambiguity of the term 'exclusive jurisdiction'. This notion is essentially a negative notion, and thus may be interpreted differently. To 'exclude' jurisdiction may mean: excluding the default jurisdiction (e.g. jurisdiction according to domicile); excluding any foreign jurisdiction; excluding jurisdiction of courts of particular type; excluding courts which are territorially not competent; excluding any prorogation agreement or some of them; excluding arbitration (domestic or foreign); excluding any other option but the jurisdiction of a single body. Although various textbooks have tried to produce various classifications of exclusive jurisdiction (introducing terms such as *international exclusive jurisdiction*, *territorial exclusive jurisdiction* etc.) they are neither complete nor neatly followed by legislative texts. The result is twofold. On one hand, in particular in national law, it is not always easy to interpret whether 'exclusive jurisdiction' is provided and, if yes, what is the meaning and scope of such a provision. On the other hand, at the legislative level, all consequences of providing (or not providing) exclusive jurisdiction in particular matters are often not taken into account, what can result in inappropriate regulation and unexpected outcomes (such as the one described in the introductory case study).

⁴⁹ This regime, which reflects the situation in the country that is typical 'importer' of foreign awards, has an interesting parallel in another country, which is a typical 'exporter' of arbitral decisions. In Switzerland, Art. 192(1) LPIL permits full exclusion of the actions to set aside the awards (including, but not limited to public policy reasons). This, however, can only happen in disputes in which none of the parties has its seat or domicile in Switzerland; obviously, the Swiss law holds the view that an option of control (and in particular the control of consistency with Swiss public policy) is necessary if any Swiss party participates in arbitration. What is the same is that a 'domestic' element motivates the need to maintain the control from the point of view of domestic public policy.

This leads us back to the issues of (in)arbitrability caused by the cases of exclusive jurisdiction. If we revisit the list of nationally and internationally provided cases of exclusive jurisdiction, it is striking that some issues keep reoccurring: immovables, ships, aircrafts, companies, patents, antitrust, military, nuclear damages, oil pollution, bankruptcy, enforcement. At the first sight, it may be an indication that views on (in)arbitrability of modern states are not so vastly different at all, and that a chance for harmonization exists in this respect as well. Yet, the devil may be in the details, as showed by a number of published works on issues such as arbitration and antitrust or bankruptcy law. In the context of immovables, discrepancies are possible regarding e.g. the meaning of the term 'rights *in rem* in immovable property'; whether timesharing agreements are covered by the notion of 'lease'; or, as in the introductory example, whether arbitral tribunal may validly decide on costs in matters that were held to be inarbitrable.

Yet, all these issues prove that further research in this area may produce valuable insights, especially if it is going to be conducted as one of the items on the future agenda of the UNCITRAL. Such research can lead to more understanding of what are matters that are in various jurisdictions regarded as suitable for arbitration, and what are the existing limitations on the parties' capacity to enter into valid arbitration agreements. It is possible that some of the limitations of arbitrability, including certain provisions on exclusive jurisdiction, will be found partially or wholly antiquated (e.g. in case of some disputes regarding immovables or some disputes arising out of bankruptcy proceedings). For some other issues, like nuclear damages or oil pollution (and possibly some further forms of global disasters), it is likely that public policy considerations will continue to play an important role, and that it will have an impact on (in)arbitrability of such disputes as well.

In any case, my suggestion is that the rules on both objective and subjective arbitrability cannot be explored in isolation from the general attitude towards what should be an area of concurrent jurisdiction (with the corresponding possibility of competition among various fora and various dispute resolution mechanisms) and what should remain, to a lesser or greater content, within the range of particular adjudicational mechanisms of a particular state. A radical departure from the basic parallelism in the regulation of arbitrability and prorogability (where the two notions are coordinated and the parallelism makes sense) could result in an unwanted tension, which could eventually backlash against the use of arbitration. If some of the present forms of exclusive jurisdiction cannot be maintained in the light of historic developments, one

should strive to soften or remove them in both aspects simultaneously, by a single strike: as the rules that prevent prorogation of court jurisdiction, and as the rules that prevent arbitration. This may be a longer and more difficult way, but in the long run it will pay off. It is better to remove certain disputes from the ambit of arbitration, than to feed the image of arbitration as a universal tool to circumvent the legitimate limitations of national public policy. As stated by very knowledgeable experts,

... the arbitration tribunal, despite being a creation of the parties, not only owes a duty to the parties but also the public. The success of arbitration as a recognized dispute settlement mechanism is also due to the fact that arbitration is not abused to circumvent the policy of states in areas which are considered to be so crucial that they are reserved for adjudication by courts.⁵⁰

In the meantime, a message to the parties who draft arbitration clauses is to study carefully some – in the end not so numerous – situations in which national laws do not allow or limit arbitration. In certain situations, for the parties it will also mean: *cavete et colite fori exclusivi*.

⁵⁰ Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer, 2003), 221, para. 9.97.