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«INTERNATIONAL COMMERCIAL ARBITRATION: MODERN TRENDS AND CHALLENGES (FROM ARBITRATION CLAUSE TO ARBITRATION AWARD ENFORCEMENT)»

- **The Role of International Commercial Arbitration in Foreign Economic Relations**
- **Arbitration Proceedings**
- **Economic Courts and International Arbitration**

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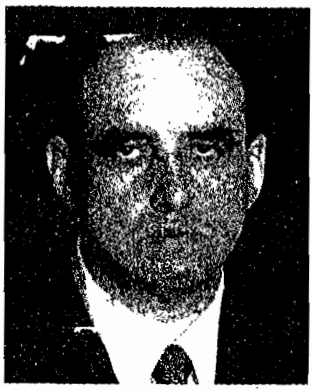
THE LEGAL NATURE OF INTERNATIONAL COMMERCIAL ARBITRATION AND THE EFFECTS OF CONFLICTS BETWEEN LEGAL CULTURES



A. BELOHLAVEK

1. The Doctrine Applicable to the Character of Arbitration from the Perspective of the Relationship between the Arbitrator and the Parties

The nature of arbitration has long been the subject of extensive academic discussions. These disputes have been ongoing ever since the end of the 19th century when a French court [of law] in the *Del Drago*[1] case delivered a decision ruling that an arbitration award is partly a contract and partly a court ruling. Analysing the nature of arbitration in the individual states requires that we first become acquainted with the individual, conceptual and doctrinal approaches which have evolved in the course of time and are applicable to these issues.

1.1. Contract Theory

This theory is based on the assumption that the arbitrators' authorization to hear and settle a dispute is based on the agreement of the parties stipulating that, on the one hand, courts of law [meaning courts as public authorities] will be excluded from the settlement of their disputes arising from a particular legal obligation and, on the other hand, the parties will voluntarily/on the basis of their own agreement submit to arbitration. According to this approach, in its standard version, the arbitrator is not finding the law but attempting to determine the will of the parties corresponding to the contents of their legal relationship which is the subject of their disagreement, based on the authorization granted by the parties and on their behalf. The question that immediately follows naturally asks what the nature of the arbitration award is, or rather what the enforceability of such award is based on, with regard to how the enforceability is incorporated in the laws of many countries. The reason is that if the arbitration

[1] Judgment of the Cour de Appel de Paris, December 10, 1991, in Marquis de Santa Cristina et al. v. Princess del Drago et al., published in: Clunet, 1992, p. 314 et seq. The Del Drago case concerned the estates of Queen Marie Christine of Spain; one of the crucial issues in said case was the determination of the law applicable to the respondent's status. The court concluded that the applicable law, or the law applicable to the respondent's status, was the law of the Pontifical State because Princess del Drago belonged, due to her marriage, to the Papal House. Cf. for instance Rubino-Sammartano, Mauro. International Arbitration Law, KLI, 2nd ed., 2001, p. 4 et al.

award were solely the expression and confirmation of the agreement between the parties, one could invoke no more than a violation of this agreement. The award could hardly (under this classical and historically original contract theory) represent an enforceable title approved by the state (public power)[1].

The contract theory can be subject to another principal objection, namely its solution of the issue of the arbitrator's status. If we accept the view that the arbitrator is endowed with a *quasi* authorization *(quasi mandate)* granted by the parties, then the arbitrator logically loses his or her impartial position (the arbitrator is no longer independent of the parties to the proceedings); however, such status is a fundamental prerequisite and an imperative requirement in more or less all modern arbitration laws and the failure to meet this requirement, conversely, results in the arbitrator being disqualified.

From that perspective, the theory claiming that arbitrators are not finding the law is unsustainable – an arbitration award is in fact an authoritative decision adopted by an independent authority, the parties submit to the jurisdiction of this authority and are bound to observe its decision. Arbitration therefore differs, and must principally, from any other settlement discussions between the parties or other methods – so-called alternative dispute resolution methods (international practice employs the abbreviation «ADR»)[2]. This conclusion applies despite the general obligation of arbitrators articulated in most modern arbitration laws, i.e. the obligation to guide or lead the parties and provide any assistance necessary for them to reach an amicable settlement of their dispute[3]. A decision/arbitration award delivered at the request of the parties and copying their agreement (which the parties reached outside the arbitration proceedings) on the amicable settlement of the dispute is therefore of a similar character. This is one of the advantages of arbitration – the arbitration award copying the will and the agreement of the parties de facto guarantees to the parties (due to the enforceability of the decision) that their agreement will be observed or that in case it is breached, they will have a document on the basis of which they could directly demand, the performance of such agreement.

1. 2. Jurisdiction Theory

Jurisdiction theory is the opposite of the contract theory described above. According to the jurisdiction theory, arbitration is analogous to litigation [contentious court proceedings] the purpose of which is the authoritative finding of the law and a final determination of the dispute between the parties on the basis thereof[4]. This theory is therefore based on the assumption that arbitration is a contentious procedure in which the arbitrators exercise their decision making power. Such power is delegated to

[1] Modern contract theory attempts to counter this objection; this modern theory is based on the presumption that the arbitration itself is based on a contract but the act terminating these proceedings (i.e. typically an arbitral award) has a different basis.

[2] Id est Alternative Dispute Resolution.

[3] The author is of the opinion, though, that their acts are limited by procedural possibilities. It is important to emphasize the word support (the obligation to provide support or lead the parties [towards an amicable settlement]) because these expressions accentuate the obligation of the arbitrators to provide procedural space to the parties necessary for them to seek an amicable settlement. The arbitrators have many such instruments. For instance, they can suspend the proceedings, adjourn the oral hearing if they discover that the parties are genuinely attempting to find a consensus and should the oral hearing continue, it could – conversely – aggravate their dispute etc.

[4] *Mužíková, Petra.* Vymezení mezinárodní obchodní arbitráže – problematika mezinárodního prvku [Title in translation: Delineation of International Commercial Arbitration – the Dilemma of Defining the International Element], Právník, Vol. 148, no. 4, pp. 377–388.

the arbitrators by the state (not by the parties). The objective of this procedure is the settlement of the existing dispute by finding the law. It is obvious at first sight that this theory can be subject to certain reservations as well. First of all, it is the willed act of the parties which is necessary to initiate/establish said jurisdiction (power), i.e. the arbitration agreement whereby the parties voluntarily waive their right to have their dispute heard in a court [of law]. Only after the arbitrator performs an ex officio examination and concludes that any and all conditions for submission to arbitration (according to a valid agreement of the parties) have been fulfilled, his or her acts assume the nature of the finding of the law and the arbitrator settles the dispute in a manner similar to the procedure adopted by judges. The only difference, without any significant impact on the assessment of the character of arbitration, is that the arbitration award is rendered by a private-law person, as opposed to a public-law judicial authority, and the state endows the arbitrator's decision with the quality of an enforceable title.

The fact that in most cases the state retains certain control or regulatory functions with respect to arbitration, complies with the jurisdiction theory as well. These especially include the possibility of setting aside (annulment) of arbitration awards by courts, as incorporated in most modern arbitration laws. However, such retrospective control applies only (apart from a few exceptions) to issues/examination of whether all the requirements for submission of the dispute to arbitration and authoritative settlement of the dispute were duly fulfilled and the court is not allowed to review the merits of the case[1]. Courts are therefore prohibited from delving into the legal or factual assessment of the case. In other words, the court review must not be interpreted as appellate proceedings or as a further stage in the arbitration proceedings[2]. The instrument of annulment of arbitration awards represents an exclusively retrospective control, exercised by the state, the purpose of which should be to establish whether the requirements for the delegation of court jurisdiction to a private-law person were fulfilled and, at the same time, whether the fundamental prerequisites for the arbitrator's acts aimed at adopting an authoritative enforceable decision on the merits of the case were fulfilled as well. An «appellate remedy» in arbitration could exist in the form of an agreement of the parties that the arbitration award shall be/can be reviewed by another arbitrator(s). This procedure is logical if the state, in this situation, allowed the delegation of its jurisdiction powers through an agreement of the parties. Such delegation can be interpreted as an exercise of the subjective right to fair trial[3] observing a stipulated procedure conducted before another authority, i.e. an authority different from public power.

The possibility of choice provided by the state (through its legislative sover-

[1] *Belohlavek, Alexander* et Pezl, Tomas. Mezinarodni a tuzemske rozhodci rizeni z pohledu cl. 36 listiny zakladnich prav a svobod a pravomoci soudu a ustavou garantovanych práv (Institut zruseni rozhodciho nalezu v souvislosti se zakazem revision au fond) [Title in translation: International and Domestic Arbitration from the Perspective of Article 36 of the Charter of Fundamental Rights and Freedoms and the Jurisdiction of Courts and Rights Guaranteed under the Constitution (Annulment of Arbitration Awards in Connection with the Prohibition of Revision au Fond)]. Pravnik, 2006, Vol. 146, no. 7, pp. 768–802.

[2] *Belohlavek, A.* Druha instance v rozhodcim rizeni [Title in translation: Appeal in arbitration]. Pravni zpravodaj, 2003, no. 7, p. 5 et seq.

[3] *Fiala, J.* et al. Problemy dokazovani — Pojem dukazu ve smyslu procesnim [Title in translation: Issues of Proof — The term «Evidence» in a Procedural Sense]. Stat a pravo. Prague (CZ): Academia, 1967, no. 13.

eignty) appears fundamental. On the basis of this possibility and through their autonomy, private-law entities decide[1] whether to vest the power to settle/decide their dispute in a state [public] authority (court of law) or in another [private-law] entity (arbitrator). The latter represents a deviation from one of the fundamental rights guaranteed by the state, i.e. the right of a public hearing of the dispute by an impartial authority. Consequently, and considering the character of arbitration or rather of the arbitration award as an authoritative final decision in the case, we should be more inclined towards the jurisdiction theory. It is hard to perceive the jurisdiction of arbitrators as a power based solely on the agreement of the parties. Such an agreement can, in theory, suspend the right to have one's dispute heard before a regular court but if and only if the particular state expressly provides for such a possibility. The particular state always means the state where the place of arbitration is located[2], but in most cases also the state of recognition and enforcement of the arbitration award. A contrary approach would render null and void any agreement whereby one's fundamental rights (in the present case the right to fair trial) are voluntarily waived. The right to fair trial belongs to the category of inalienable rights which cannot be waived without a statutory mandate. Indeed, the result of any procedure would in such case be merely an agreement of the parties on the resolution of their dispute the result of which could, however, never constitute an enforceable title and any claims arising under this agreement, or the breach thereof, would have to be submitted to a [state] court [of law]. The suspension of the right to fair trial and its replacement with a different procedure in the course of which the parties can, as an alternative, submit their claims with an independent authority for an authoritative and final resolution, must therefore be perceived as a delegation of one of the fundamental functions and powers of the state to another, private-law entity. This also explains why the state retains the right to check whether any and all conditions for such delegation were duly satisfied. If the state determines that these conditions were not duly fulfilled, the state withholds from the arbitration award the status of enforceability by public authorities.

One of the reasons underlying the delegation of this [state] jurisdiction and indeed its extensive use in practice is that the parties can influence the choice of forum and its establishment (appointment), often giving voice to their requirements for qualification and other qualities of the arbitrator depending on the subject matter of the dispute. The choice of a particular arbitrator is considered to be one of the main advantages of arbitration which could substantially contribute to the flexibility and efficient hearing and resolution of the dispute, as well as to the confidence of the parties in such proceedings and their acceptance of

[1] Cf. for instance Rozehnalova, Nadezda. Zasada autonomie a zasada rozhodovani rozhodcu o sve pravomoci — dve strany jednoho problemu [Title in translation: The Principle of Autonomy and the Principle of Arbitrators Making Decisions on their Jurisdiction — Two Sides to a Single Problem] Casopis pro pravni vedu a praxi [Journal for Legal Science and Practice], 2008, pp. 112.121.

[2] Rozehnalova, Nadezda. Dolozky o pravnim rezimu a o reseni sporu v pripade smluv v mezinarodnim obchodnim styku [Title in translation: Clauses on Legal Framework and Dispute Resolution in International Trade Relations], Pravni praxe v podnikani (CZ), 1998, No. 1, p. 2,et seq.; Rozehnalová, Naděžda. Určení fór a jeho význam pro spory s mezinárodním prvkem [Title in translation: Specification of forum and its meaning for disputes with international elements], Bulletin advokacie (CZ), 2005, I: No. 4, II: No. 5; Rozumov, K. The Law Governing the Capacity to Arbitrate, ICCA Congress Series, 1994, No. 7; Ruzicka, Kveto slav. Je rozhodci smlouva zakladem rozhodciho rizeni? [Title in translation: Does Arbitration Agreement Constitute Basis for Arbitration?], Bulletin advokacie (CZ), 2005, No. 10.

the results thereof. At the same time, it represents the inalienable right of the party as an expression of the party's state-approved autonomy; this right can be restricted or suspended only if there is another interest connected with the same dispute and the same proceedings which ought to prevail. Such a situation occurs, for instance, in the case of the joinder of parties in arbitration. In this case the interest in flexible procedure and in the proceedings being effective and feasible prevails. With respect to the proportionality as defined above, the right to choose one's own arbitrator and autonomous determination of the conditions of such choice can be restricted only by another interest related to the same proceedings. Arbitration is therefore a different exercise of judicial power[1] in which the state-approved autonomy of will of private-law entities is reflected, restricted by the state's idea of the limits of such autonomy. Arbitration cannot be perceived as proceedings not in compliance with, or breaching, the state-guaranteed right to fair trial. Arbitration means proceedings which exist and are conducted on the basis of conditions and requirements laid down in the law of the state where the proceedings take place, or always in the law of the state in which the arbitration proceedings and the result thereof ought to have the qualified effects. If all the state requirements for the initiation and conduct of arbitration proceedings are fulfilled, as well as requirements for the appointment of arbitrators, the duly appointed arbitrator can be perceived as a statutory judge from the perspective of the statutory right to fair trial and in compliance with the right not to be deprived of one's lawful judge. Considering the regulatory and control function of the state, we can agree with the view that an arbitrator can be characterized as an impartial person finding the law and the arbitration award as an authoritative decision and not merely a qualified expression of the contents of the parties' agreement. Simply speaking, the parties do choose the particular arbitrator; but for them to be able to do so, the state must first approve such procedure generally and endow the potential arbitrators with the power to render authoritative decisions. Arbitration cannot be held «in a vacuum». On the contrary, these proceedings are always held within the framework of a particular legal system. This legal system stipulates specific conditions under which it is possible to delegate the power to hear and resolve the dispute on the arbitrator, should the parties opt for such an alternative (i.e. exercise their autonomy). Such primary delegation of the functions of the state is a primary condition for the transfer of the power to settle disputes from the area of public law to private law. This is the only way of securing the enforceability of arbitration awards as decisions of a private-law entity (arbitrator/s) on whom or on the method of whose appointment the parties agree in their arbitration agreement. At the same time, however, the arbitration award is not the decision of a public authority. Consequently, the enforceability of arbitration awards cannot be based on the agreement of the parties; it is primarily based on the legal framework whereby the state defines the conditions for the enforceability of arbitration awards. This applies not only to the enforceability of «domestic» arbitration awards but also for the enforceability of arbitration awards under international

[1] Mothejzikova, Jitka. Uloha narodnich soudu — podpora nebo dohled? [Title in translation: The Role of National Courts — Support or Supervision?] Evropske a mezinarodni pravo [European and International Law], Prague, 1998, no. 1–2, p. 46

[2] Especially the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

treaties[2]. Such enforceability also results from an act of the state, in particular its approval expressed in the form of an international legal commitment. Considering the fact that the particular international legal framework regulates the status of the arbitrator, we cannot agree with the view that such status is only a private-law relationship established under the agreement between the arbitrator(s) and the parties. It cannot be a «mere» private-law relationship because, *inter alia*, the arbitrator's status is defined by a particular legislative framework which the arbitrator must not transgress and his or her status cannot be modified by a different agreement of the parties.

A contrary approach, i.e. an approach based on the contractual basis of arbitration, builds on the view, a somewhat *chimerical idea* today, that the parties ought to have an active interest in solving disputes and it is therefore basically irrelevant where (in which territory and in which legal environment) the arbitration takes place. The theory sometimes even refers to the so-called *anationality* or *denationalization* of arbitration[1]. This means that the arbitration is independent of the place of the proceedings and both the basis and the conditions thereof are determined exclusively by the agreement of the parties. As suggested above, the author considers such theories extremely detached from reality. The currently prevailing commercial and especially international reality is completely different; and it is by no means a positive phenomenon. In the real world of business (unfortunately) the parties are often reluctant to perform their obligations. After all, the number of disputes in commercial transactions which steadily increases is clear evidence thereof. What is more important, though, is that irrespective of the agreement of the parties on the jurisdiction of an arbitral tribunal articulated in the arbitration agreement, it is usually the defendant who attempts to make use of any and every opportunity to raise as many procedural obstacles to the arbitration proceedings as possible and the unsuccessful party usually makes every effort to evade the voluntary performance of their obligations. This statement is supported by the results of fairly recent researches focused on arbitration according to which the unsuccessful party tries to find grounds for reversing the result both in court proceedings and in arbitration. In the case of arbitration, the unsuccessful party naturally tries to find flaws in the formal procedure adopted by arbitrators which are significant enough, to open the possibility of the annulment of the arbitration award, in compliance with the

[1] See for instance Bagheri, Mahmood. International contracts and national economic regulation: dispute resolution Through International Commercial Arbitration (Studies in Comparative Corporate & Financial Law). Kluwer Law International, 2000, p. 115; Lew, Julian, D., M. Pervasive Problems in International Arbitration. Mistelis, Loukas (ed.) International Arbitration Law Library Series. Kluwer Law International, 2006, p. 81, Lalive, Pierre. On the Neutrality of the Arbitration and of the Place of Arbitration. Recueil de Travaux Suisse sur l'Arbitrage International, Zurich: Schulthess Polygraphischer Verlag, 1984 or Rensmann, T. Anationale Schiedsssprüche im nationalen Recht, 1997, or Rennsmann, T. Anational arbitral awards — legal phenomenon or academic phantom? Journal of International Arbitration, 1982; Paulsson, Jan. Arbitration Unbound: Award Detached from the Law of its Country of Original. International Commercial Law Quarterly, 1981, Vol. 4. 30, p. 358 et seq. et al.

[2] Lex arbitri is sometimes confused with lex fori; moreover, both concepts are sometimes used interchangeably which is somewhat inaccurate. Lex arbitri is usually defined as the law applicable not only to the method of conducting the dispute and to procedural issues but also to interim injunctions issues; it is defined as the law which lays down the rules of supervision over or assistance to arbitration exercised by a court of law. Regarding this issue see a detailed analysis in Belohlavek, Alexander. Vyhrada verejneho poradku hmotnepravniho a procesniho ve vztazich s mezinarodnim prvkem [Title in translation: Reservation of Substantive and Procedural Public Policy in Relationships with International Elements]. Právník, Prague: Ustav statu a prava Ceske akademie ved [Institute for State and Law of the Czech Academy of Sciences], 2006, Vol. 145, no. 11, pp. 1267–1301, see footnote no. 72 in the cited article.

applicable rules of *legis arbitri*[2]. If the party's efforts fail (which, paradoxically, proves that such efforts were fraudulent) he or she at least tries to artificially establish, for instance, the violation of public policy or another situation which would allow for the order and therefore the effect of the arbitration award to be reversed in whatever manner possible[1]. Naturally, international practice correctly denies protection to such fraudulent efforts, and proposals for the setting aside of arbitration awards are, in the international context, successful only in a negligible number of cases. But it clearly demonstrates the reality of the world today, that without a public authority guaranteeing enforcement of arbitration awards through its public power, arbitration in today's business environment would be de facto deprived of any sense.

However, we must emphasize that an arbitration agreement, just like any agreement on the jurisdiction of a forum authorized to resolve private-law disputes[2] the character of which is procedural (at least in continental law countries and definitely in the countries of Eastern and Central Europe), can in no case be confused with an agreement on applicable [substantive] law, i.e. an agreement on the choice of the applicable law; the same applies all the more to an agreement on the place of [arbitration] proceedings. This conclusion applies despite the fact that as concerns agreements on dispute resolution (the so-called *jurisdiction agreements* which include, according to the author of this paper, arbitration agreements)[3] the parties[4] are endowed with a certain degree of autonomy which differs depending on the circumstances of the particular contractual relationship[5]. Nonetheless, in the modern international environment the degree of permitted contractual autonomy is rather high, both as concerns the choice of the applicable (substantive) law and as concerns jurisdiction agreements, i.e. dispute resolution agreements. In any event, it is the place of the [arbitration] proceedings whose law defines the scope of this contractual autonomy (we usually refer to the so-called objective arbitrability in connection with the possibility to conclude an arbitration agreement)[6]; principally we especially have to take into considera-

[1] *Cf. Webster.* Arbitration International 2006, 431, 461 et seq., here in an update Berger, Klaus, Peter. Private Dispute Resolution. Kluwer Law International interactive on line, 2006 update (electronic version available also at http://www.private-dispute-resolution.net/updates.html).

[2] *Tyc, Vladimír* et Rozehnalova, Nadezda. Prorogace. Mezinarodni rozhodci rizeni — vzajemne vztahy rizeni pred rozhodci a rizeni soudniho [Title in translation: Prorogation. International arbitration — mutual relation between arbitration and litigation], in: Vybrane problemy mezinarodniho prava soukromeho v justicni praxi [Title in translation: Selected problems of private international law in jurisdictional practice], 2nd ed., Brno, 1997, p. 27 et seq.

[3] *Kohler, Ch.* Internationale Gerichtsstandsvereinbarungen: Liberalitaet und Rigorismus im EuGVÜ, IPRax 1983, pp. 265–272.

[4] *Briza, P.* Choice of Court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of the Brussels I Regulation be the Way Out of the Gasser-Owusu Disillusion?, Journal of Private International Law, 2009, pp. 537–563.

[5] *Czepeluk, Marcin.* Umowa miedzynarodowa jako zrodlo prawa prywatnego miedzynarodowego [Title in translation: Conventions as Source of Private International Law], Warszawa: Wolters Kluwer Polska, 2008.

[6] Interestingly, Professor Nadezda Rozehnalova maintains that the scope of objective arbitrability must be assessed according to (i) lex arbitri, (ii) lex causae of the main contract and (iii) according to the law applicable to the arbitration agreement. The author of this article principally agrees, with the exception of the significance of substantive lex causae which, according to the author, does not influence the assessment of the scope of objective arbitrability. Nonetheless, in certain exceptional cases lex causae may also be of importance (albeit limited) vis-a-vis objective arbitrability; this applies for instance in the case of the so-called overriding mandatory rules, see for instance Pauknerová, Monika. Overriding Mandatory Rules and Czech Law, in: Belohlavek, Alexander et Rozehnalova, Nadezda (eds) Czech Yearbook Of International Law (CYIL), Huntington (NY): Juris Publishing, 2010, Vol. I, pp. 81–94; Paunkerova, Monika. Evropske pravo a nektere nove trendy v mezinarodnim pravu soukromem [Title in translation: European law and certain new trends in private international law], Pravnik, Prague: Ustav statu a prava Ceske

tion the scope of this *objective arbitrability* when concluding an arbitration agreement.

1. 3. Mixed Theory

This theory attempts to combine both of the above mentioned doctrines, accentuating, on the one hand, the fact that arbitration is possible only upon a mutual agreement of the parties on the submission of their dispute to the jurisdiction of arbitrators. Arbitration proceedings are no doubt based on the will of the parties to exclude the jurisdiction of courts [of law] from the resolution of a particular dispute and, at the same time, select a different entity authorized to adopt a final and authoritative decision regarding the dispute instead of the court. The parties conclude an agreement on the basis of which the jurisdiction of the arbitrators is established and which, at the same time, determines the fundamental terms of the arbitration proceedings; the parties also choose the persons authorized to settle the dispute and the place of the proceedings[1]. At the same time, however, this theory concedes that the contractual approach to arbitration suffers from certain deficiencies, especially with respect to the basis of the arbitrators' status and enforceability of the arbitration award should it be interpreted (according to the contract theory) as a mere finding of the contents of the agreement of the parties, or as a certain authorized agreement on the settlement of the dispute between the parties. Compared to the jurisdiction doctrine, the mixed theory is based on the autonomy of arbitrators as independent entities to whom the state delegated its power to find the law. The status of arbitrators is defined and limited by the laws of the particular state and arbitration proceedings can be implemented exclusively within such limits and in compliance with the particular legal system.

The author is basically inclined towards the mixed theory. Nonetheless, that theory principally emphasizes the significance of the legal framework of the state of the proceedings and of the state of the recognition and enforcement of the award; the author is therefore in

akademie ved [Institute for State and Law of the Czech Academy of Sciences], Vol. 148, no. 2, p. 121 et seq., Belohlavek, Alexander. *Rimska umluva / Narizeni Rim I. Komentar* [Title in translation: Rome Convention / Rome I Regulation. Commentary]. Prague: C.H. Beck, 2009 [in 2010 published also in English, Polish, and in the Taxon publishing house in Kyiv also in Russian), commentary on Article 9 of the Rome I Regulation; Novy, Zdenek. Arbitration Clause as Unfair Contract Term from the Perspective of Czech and EC Law. *Global Jurist*, Berkeley, CA, U.S., The Berkeley Electronic Press, 2009, Vol. 9, no. 4, p. 36 et seq., Rozehnalova, Nadezda. Party Autonomy and its Restrictions According to Rome I Regulation, in: The Role and Place of Law in a Society Based on Knowledge. Targu-Jiu (Romania): «ACADEMICA BRANCUSI» Publisher, 2009, pp. 28–35; Kucera, Zdenek. Pouziti tozemskeho prava v obcanskopravnich vztazich s mezinarodnim prvkem [Title in translation: Application of Domestic Law to Civil Legal Relations with International Element], Pravnik (CZ), 1985, p. 274 et seq.; Valdhans, Jiri. Interakce komunitarni procesni a kolizni upravy deliktu za soucasneho vlivu hestatnich prostredku [Title in translation: The interplay of community procedural law and community collision rules for tort under the influence of non-governmental means], in: Uloha medzinarodneho prava a europskeho prava v 21. storoci z pohl'adu krajin V4 [Title in translation: The Role of International Law and European Law in the 21st Century from the Perspective of the Vysegrad Four]. Trnava (Slovakia): Trnavska univerzita v Trnave, Pravnicka fakulta [Trnava University in Trnava, Faculty of Law], 2009, pp. 1–10, Belohlavek, Alexander. Arbitrabilita sporu [Title in translation: Disputes *Arbitrability*], *Právní rozhledy*, Prague, C.H. Beck, 2003, no. 3, p. 6 et seq.; Krepelka, Filip. Problems with Understanding of European Law in New Member State, Czech Law in European Regulatory Context, 2009, Vol. 1, pp. 1-11 et al.

[1] See for instance Dobias, Pavel et Dobias, Petr. Arbitrabilita sporu tykajicich se nemovitosti podle platne pravni upravy CR [Title in translation: Arbitrability of Real Estate Disputes Pursuant to CZ Law], *Pravnik* (CZ), 2005, no. 8; Chovancova, Katarina. Medzinarodna arbitraz v bankovych uverovych zmluvach s cudzim prvkom [Title in translation: International Arbitration Concerning Foreign and Domestic Bank Loan Agreements], Obchodne pravo (SK), 2003, Vol. 3, no. 11, pp. 72–76; Mates, Pavel. Rozhodovani sporu organy verejne spravy [Title in translation: Resolution of Disputes by Administrative Tribunals], Pravni radce (CZ), 2007, no. 12, pp. 41–46, Marek, Karel. Poznamky k rozhodcimu rizeni podle slovenske pravni upravy [Title in translation: Commentaries to Arbitral Proceedings Pursuant to Slovak Law], Danova a hospodarska kartoteka (DHK) (CZ), 2006, Vol. 14, no. 3, pp. 27–29; Sokol, Tomas. Vazanost rozhodce pravem CR ve vnitrostatnim sporu [Title in translation: Selected Issues Concerning Domestic Disputes before CZ Arbitral Proceedings], Pravni forum (CZ), 2008, Vol. 5, no. 4, pp. 134–139.

many respects and to a certain extent closer to the jurisdiction theory. The author believes that the contract theory played its role especially in the past and has survived only as a sort of a relict. The reason is that the contract theory is fundamentally based on the premise that the parties wish to perform their obligations and are only searching for somebody to determine the contents thereof, so that they can make arrangements accordingly. Although such an approach ought to be essentially correct and the interest in fulfilling the principle of *pacta sunt servanda* should be the generally prevailing interest, the contract approach as described above is too detached from current reality. Instead of the desire to perform one's obligations and to solve a dispute, every other dispute submitted to arbitration (or even more of them) is pervaded by maximum efforts of the parties (naturally the defendants or counter-defendants) to challenge jurisdiction, by as many procedural obstructions as possible, by attempts to find any grounds substantiating the annulment of arbitration awards after they have been rendered etc. Extremely unprofessional attacks directed at arbitrators whereby the parties make artificial allegations regarding their disqualification are not rare either. On the other hand, the plaintiff, or the party which has succeeded in the proceedings, is always interested in obtaining a final and enforceable decision as soon as possible, which could be subjected to involuntary enforcement by a public authority, in whichever state such enforcement ought to take place. It is therefore clear that the parties to the proceedings, i.e. the so-called users of the arbitration system, are those who themselves rely on and look for maximum protection provided by public authorities. It would be no exaggeration to say that without the public-law framework of arbitration, arbitration proceedings today (in whichever country) would be deprived of their real and with reality connected justification. The author believes that the frequent contract theory may correspond to the ideal picture but it exposes the total absence of reality on the part of those who support that theory. This also explains why the author advocates the mixed approach but with greater emphasis on those aspects of the doctrine which are closer to the jurisdiction theory than to the contract theory. An even more detailed specification of the author's standpoint is as follows: the very basis of the arbitration proceedings, the primary foundation, is the legal framework; this legal framework is, however, initiated both by the agreement of the parties incorporated in the arbitration agreement, and by the particular dispute which delimits the subject matter of the proceedings in case of a dispute in the procedural sense.

1.4. Autonomous Theory

The last theory is the autonomous theory which, with respect to the above described specifics, treats arbitration as a sui generis proceedings which cannot be automatically subjected either to the application of general contractual principles or to the rules regulating civil proceedings in courts of law. This theory stipulates that the relationship between the arbitrator and the parties is necessarily specific as well. According to this theory, this relationship can in no case be viewed from the perspective of the classical contract doctrine, as a common contractual relationship whereby the parties «hire» a private-law entity (in this case, the arbitrator) for the resolution of their dispute. Similarly to the specific approach to the arbitration itself, this theory also treats the relationship between the arbitrator and the parties as a sui generis relationship.

2. Certain Aspects of the Effects of Doctrinal Differences between Individual Approaches to Arbitration

The character of the different approaches to the evaluation of the basis of arbitration is a question of doctrine and legal culture. It is connected with the fact that especially common law countries (i.e. countries based on customary law) have a completely different perception of the exercise of state (judicial) power[1]. In common law countries, the so-called administration of justice, i.e. the exercise of judicial power in general, is perceived as a contract entered into by and between the citizen and the entity endowed with the power of enforcement. The fact that arbitration is an alternative to proceedings in a court [of law/state court] therefore constitutes no principal difference. This supports the idea expressed by the author above, i.e. that arbitration, if deprived of its connection with the means of enforcement, would lose all of its appeal. Indeed, claiming that arbitration merely assists in the finding of the contents of the legal relationship (obligation) between the parties is therefore probably only a *beautiful idea*. In reality, arbitration means the administration of justice and finding of the law. Besides, this is confirmed not only by learned opinions of academics but also by a fairly extensive case law from a number of *civil law* countries, i.e. countries with typically continental law. The most illustrative example is probably the concept adopted by German law[2].

It is true that arbitration today is a highly internationalized method of dispute resolution. Considering the fairly high degree of hegemony usurped by English in arbitration proceedings which represents the notional *Esperanto* of the international environment and especially of global economics, it is only logical that the concepts of arbitration have been substantially influenced by the English-speaking legal practice. It comes as no surprise then that the experts appointed to serve as arbitrators in important disputes are very often these English speaking representatives of the international legal community; consequently they directly contribute to the development of the concepts of arbitration as well. However, this internationalization, supported by the fairly strong influence of *common law*, entails a number of hidden risks too. The problem is that the environment of a purely continental legal culture is infested with elements totally incompatible with this culture. However, these manifestations of incompatibility and their true causes suggested by the author above cannot be obliquely covered by references to a purely contractual nature of arbitration or even attempts to so-called denationalize arbitration. Arbitration in private-law disputes is and must always be conducted within a real legal environment defined by the laws of a particular country. Without being firmly rooted in the

[1] This is manifested in a number of instruments. One of them are the so-called anti-suit injunctions which were clearly and unambiguously rejected by the European Court of Justice as well and which have been rejected by the continental legal environment as a major excess of judicial power, or even interference with the sovereignty of the judicial power of other countries. In common law countries, though, it is a commonly used instrument. Cf. for instance Giovannini, Tereza et Scherer, Matthias. Anti-Arbitration and Anti-Suit Injunctions in International Arbitration. Stockholm International Arbitration Review, 2005, Vol. 1, pp. 201–218.

[2] Supported by copious case law in Germany — see for instance the decision according to which (approximate translation, cit.) [...] Arbitration is [...] substantive-law finding of the law [...] The arbitrator, similarly to the judge of a state court, is called upon to decide a legal dispute and similarly to the judge he or she makes a binding declaration of what is lawful. The arbitration tribunal in this case / here takes the place of the court [of law].

laws of a particular state as the place of arbitration (the so-called *seat of arbitration*)[1], arbitration is deprived of its essence, its meaning and its appeal as well. It loses the aspect of legal certainty. It is only the incorporation in a specific framework defined by the arbitration laws of a particular country which provides the parties with the certainty guaranteeing that they will know precisely under what conditions the proceedings will take place and under what conditions they have the right to fight potential lawlessness and what legal mechanisms they can employ.

The attempts to instil *common law elements* in the environment of a nationalized (that is, definitely not denationalized) arbitration brings about a number of entirely conceptual problems resulting from the major differences between common law and continental law. This applies for instance to the fundamental differences regarding the dividing line between substantive and procedural law. Whereas continental law countries principally perceive the issue of jurisdiction as a *procedural* issue, in *common law* countries it constitutes a substantive law issue. In more complicated cases, when the jurisdiction of a tribunal is challenged, Western legal cultures usually employ the procedure of *bifurcation* when the issue of jurisdiction is singled out for resolution by means of a separate arbitral award (the so-called partial award)[2]. Proponents of this procedure in which the issue of jurisdiction is solved by an arbitral award (whether partial or interim award) claim that delivering the decision in the form of an arbitral award on jurisdiction allows for more effective proceedings. They argue that the parties have the opportunity to propose the annulment of the arbitral award or to challenge such decision in any other manner before the tribunal adopts a decision on the merits of the case. However, in the proceedings conducted in the countries of Eastern and Central Europe, or wherever we can speak of the so-called *pure concept of continental law*, courts are obliged to review jurisdiction in all stages of the proceedings. Decisions on jurisdiction thus cannot represent res judicata as defined by *common law*. Consequently, an extremely formalized decision-making process regarding jurisdiction is, in the countries of the continental legal environment, rather a complication. It is absolutely certain that a jurisdictional challenge raised at a particular stage of the proceedings must be *definitely solved* by the arbitrators who must provide their qualified opinion on this issue, submitted in the required form. It suffices, though, if they do so by means of a simple procedural resolution (order). However, in continental law countries where a decision on this usually exclusively procedural issue does not constitute *res judicata*, a decision on such a challenge (objection) does not deprive the parties of the opportunity to invoke the alleged lack of jurisdiction in the proceedings on the annulment of the

[1] Cf. for instance Schmalek, David. Sidlište v elektronickem rozhodcim rizeni [Title in translation: Place of Electronic Arbitral Proceedings]. Casopis pro pravni vedu a praxi [Journal for Legal Science and Practice] (CZ). 2004, Vol. 12, no. 4, pp. 313–317; Belohlavek, Alexander. Místo konani rozhodciho rizeni [Title in translation: Venue of Arbitration]. Pravni zpravodaj (CZ). 2004, No. 3, pp. 13–15; Jarvin, Sigvard. The place of arbitration. Bulletin — The ICC International Court of Arbitration. Den Haag/Paris: Kluwer Law International/ICC (December), 1996, Vol. 7, no. 2, pp. 54–58 and a number of other authors.

[2] According to the author of this article, though, jurisdiction is the so-called interim issue and if the decision on jurisdiction is adopted in the form of an award, it ought to be an interim award, not a partial award. Interim award, in the author's opinion, is an instrument used for decisions — typically — on temporary issues which represent a kind of a notional spanning (bridge); in other words, the decision on the respective issue is the necessary prerequisite for delivering a decision on the merits. Nonetheless, decisions in the form of partial arbitral awards are reasonable, to some extent, in the common law regime where jurisdiction is a substantive-law issue.

final award disposing of the merits of the case. Naturally, this is one of the many examples of the conceptual – and fundamental – differences between *common law* and continental law[1]. Attempts for the artificial denationalization of arbitration only aggravate the problem and deprive the parties to the arbitral proceedings of legal certainty.

3. Some Manifestations of the Negative Influence of Elements of Common Law within the Continental Environment of Finding of the Law in Arbitration

The artificial introduction of common-law elements in the continental environment brings about a number of other problems affecting arbitration.

One of these problems is the high degree of formalization of arbitration. In continental law countries, arbitration is capable of discharging its functions as it was originally intended. In other words, in that environment, arbitration is able to meet its fundamental characteristics, i.e. flexibility, cost accessibility and therefore economy, efficiency and proficiency. The general problem pervading arbitration especially in the countries of Western Europe, but also in north America, i.e. those countries which are characteristic for the extensive, if not dominant influence of *common law* on arbitration, is that the costs of the proceedings as well as the complicated and formal procedure deprive this method of finding of the law and settling of disputes of its attractiveness. The scope of submissions produced by international law *megaoffices* counting hundreds of pages and thousands of pages of (often completely unnecessary) attachments, interrogation of witnesses and experts lasting several days in both complicated and fairly simple disputes is (apart from many other reasons) the direct result of incorporating the elements of the *common law system* because due to the absence of codified law, this system has to employ other mechanisms for solving contractual relationships. The simplicity which ought to accompany both business practice and the solving of eventual disputes therefore disappears. Of course, this often entails astronomical costs of proceedings. Conversely, arbitration in the continental environment and in the countries of Eastern and Central Europe, in its pure and legal-cultural compatibility with the local environment, is still capable of guaranteeing the advantages of arbitration and is therefore becoming more and more popular.

The number of arbitrations conducted in the countries of Eastern and Central Europe has skyrocketed (which has been observed by experts from the so-called *Western world* with a bit of suspicion and perhaps envy as well). For instance in the Czech Republic, the number of disputes handled annually by the Arbitration Court attached to the Economic Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic[2], and this institution alone, exceeds 3,000. There are, however, no accurate statistics regarding the number of disputes settled by arbitration in the Czech Republic. This is

[1] Principal differences also appear in the understanding of issues such as the relation between competition (cartel, antitrust issues) and arbitration, the relation between insolvency and arbitration etc. For certain partial issues in that connection, see for instance Bejcek, Josef. Transition Countries Facing Transitory Competition Rules: Moving Shooter Taking Aim at a Moving Target, in: Zaech, R., Heinemann, A. The Development of Competition Law, Global Perspectives, Cheltenham: Edward Elgar, Ascola Competition Law, 2010, pp. 181–208; Boizeau, Domitile. Arbitration and Insolvency: Issues of Applicable Law, in: Mueller, Ch. et Rigozzi, A. (eds.) New Developments in International Commercial Arbitration, Zurich/Basel/Geneva: Schulthess, 2009 and in the works of many other authors.

due to the fact that most disputes settled by arbitrators are solved in the so-called *ad hoc* proceedings, i.e. by arbitration panels appointed outside of the jurisdiction of any permanent arbitration tribunal. Moreover, arbitral awards which become final and do not require any special approval (exequatur) by courts under Czech law are directly enforceable. Nonetheless, unpublished information drawing especially on the number of proceedings for the setting aside of arbitral awards, as well as on other sources, indicates that the number of disputes handled annually in the Czech Republic is at least one hundred thousand. We ought to point out that most of these disputes are so-called consumer disputes, i.e. disputes arising from consumer credit contracts or other disputes arising from contracts of the so-called consumer nature. This has been the tendency clearly visible in the past seven years or more. Similar expansion of arbitration reflected in the increasing number of disputes settled by arbitrators is reported from Bulgaria, Poland and other countries as well.

Critical voices coming from, for instance, Western Europe often warn the countries of Eastern and Central Europe of the so-called *Aspirin effect. Aspirin*, as a *modern medicine*, was once used to treat a number of illnesses although it was merely a *placebo* in many of those. These critical voices suggest that the countries of Eastern and Central Europe ought to support other methods of so-called *Alternative Dispute Resolution* (ADR), both apart from and perhaps even instead of arbitration. They point out the huge expansion of, for instance, mediation. However, *mediation* in a number of so-called *Western legal cultures* represents what arbitration originally represented, that is a cheap, fast, professional and informal method of dispute resolution. Due to its gradual formalization, though, arbitration has either completely lost or has been gradually losing these features. Those critics are unable to understand that in the countries of Eastern and Central Europe, arbitration is still somewhat suppressed and that it actually represents a cheaper and faster alternative to proceedings in courts [of law, state courts].

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